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ETHICAL CONDUCT IN THE PUBLIC SECTOR

Report of the Task Force
on Conflict of Interest

Hon. Michael Starr Hon. Mitchell Sharp
Co-Chairmen

J. Patrick Boyer
Executive Director

Canada

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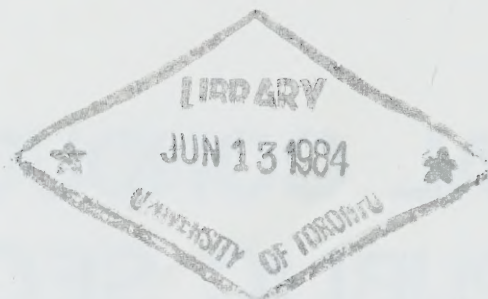
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May 1984



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CHAPTER 1

INTRODUCTION AND PRELIMINARY MATTERS

(a) Overview

Ethical conduct on the part of those who work in government has about it a paradoxical quality: we seem to worry most about it only on the occasions when a departure from the acceptable norm takes place. One could say that interest in "conflict of interest" problems ebbs and flows in direct relation to the frequency and intensity of allegations about the way government business has been conducted, or revelations about improper conduct.

Perhaps this is as it should be, and is itself an encouraging sign: ethical conduct is taken for granted; individuals are assumed to be operating honourably. Thus when someone abuses the trust that accompanies a public office, the abuse is seen as aberrant behaviour, something which should not go unpunished. The assumption that individuals should, and do, conduct themselves with propriety and in deference always to the public interest, remains generally unchallenged.

This state of mind is central to understanding the Canadian approach to matters of conflict of interest. There is frequently proof that those working in government are as human as individuals elsewhere, in that temptations which arise are not always resisted and Canada has had its share of difficulty arising out of alleged conflict of interest situations in government. Yet in comparison with certain other countries, where the political system is grounded on forms and practices of systemic corruption in government, Canada appears almost squeaky clean. The political culture of the country or region largely determines not only whether bribery and abuse of office occur, but what the attitude toward such practices will be.

It is by Canadian standards, not those of others, that performance must be judged. It is within our tradition of laws, public administration and parliamentary practice that the present state of the rules which govern ethical conduct in the federal government must be evaluated.

(b) The Mandate of Our Task Force

The mandate of the Task Force to undertake a general review of policies and practices which do and should guide the conduct of present and former public office holders in the federal government, and to make recommendations in this area is established in two documents. The first of these is a letter from you, Prime Minister, dated July 7, 1983 addressed to each of us as Co-Chairmen of the Task Force; the second is the specific "terms of reference" appended to that letter.

For the record, and for the benefit of others reading this report, your letter and the terms of reference of the Task Force read as follows:

Several months ago there was considerable debate on the nature of policies and practices that should guide the conduct of present and former office holders. As you know, policies and practices in this area require a delicate balance. On the one hand, the public interest requires the recruitment to public office of highly-qualified individuals from diverse backgrounds to participate in the public affairs and public administration of Canada. On the other hand, such office holders must carry out their official duties and arrange their private affairs in a manner that maintains public confidence and trust in government. Similarly, after their period of public service such office holders should be able to return to fulfilling employment within the community-at-large. Their actions in this regard, however, should not cast doubt on the probity or impartiality of the public policy process.

Since 1973 I have developed, in consultation with my colleagues, a series of policies and practices respecting the conduct of present and former public office holders. The establishment of such policies, as they apply to Ministers, Parliamentary Secretaries, exempt staff and full-time Governor-in-Council appointees, is a matter which falls within

the prerogatives of the Prime Minister. The effect of these initiatives has been the establishment of one of the most rigorous sets of practices and policies governing the conduct of office holders in any political jurisdiction, and restrictions on the financial and commercial activities of former Ministers which are among the most onerous of any Parliamentary democracy.

When, in 1976, I tabled policy proposals regarding the activities of present and former holders of public office, I was attempting to reconcile the benefit to society which results from the movement of individuals among the various sectors of society -- governmental, commercial, industrial, academic and professional -- with the need to protect the integrity of government service, and prevent private exploitation of the public trust. In my mind, policies in these areas would need to be reviewed from time to time to ensure they are fair and workable, and that they provide an effective means for dealing with the matters of conscience and judgement which are at issue here and which do not lend themselves to the more rigid codifications of law.

Judging from recent debate on this issue, it is clear that some would argue that any official dealing between present and former office holders gives the appearance of preferential treatment or wrongdoing. Such interpretations in my judgement not only go beyond the spirit and intent of the policies and practices developed by the Government of Canada but could also significantly and adversely affect the recruitment of highly-qualified individuals from diverse backgrounds to participate in public life.

For these reasons and consistent with my prerogatives and responsibilities in this area, I believe that it is in the public interest that a study be undertaken of the

policies and practices that should govern the conduct of Ministers, Parliamentary Secretaries, exempt staff, and full-time Governor-in-Council appointees during and after their period of public service. The results of such a study would be useful as well in reviewing policies in this area governing public servants...

I would hope that your study would focus in particular on the need to ensure both public confidence in and the integrity of the governmental process and the need to attract to government individuals of high calibre from all walks of life. I do not mean this to be a study of past conduct but rather an effort to establish the best means of conserving and enhancing the public trust and confidence in government...It would be my intention that your report be made public shortly after its receipt.

In reviewing the best means to achieve the objectives just outlined, I would ask that ... you seek views on the conflict of interest and post employment régime that should apply, review practices in this area in other political jurisdictions both domestic and international and in the private sector and ensure that any approaches you may propose in this area are consistent with the Canadian Charter of Rights and Freedoms and the principles of the Canadian Parliamentary system.

...The question of finding the appropriate balance between the requirement of attracting to public service men and women of high ability from all walks of life, while ensuring that the public trust is and is seen to be safeguarded, is of major importance. It is essential that Canadians have trust in their government and its processes and in the calibre of individuals who commit themselves to public service. Nothing less than the quality of government in Canada is at stake.

TERMS OF REFERENCE

Understanding that:

1. the public interest requires the recruitment to public office of highly qualified individuals from diverse backgrounds to participate in the public affairs and public administration of Canada; and that,
2. such office holders should carry out their official duties and arrange their private affairs in a manner that conserves and enhances public confidence and trust in government; and that,
3. after their period of public service such office holders should be able to return to fulfilling employment within the community-at-large; and that,
4. the actions of former office holders should not cast doubt on the probity and impartiality of the public policy process; and finally that,
5. it is essential that the above factors be considered in the establishment of the best means to guide the conduct of such office holders during and after their period of public service,

the Task Force shall examine and report to the Prime Minister on the policies and practices that should govern the conduct of Ministers, Parliamentary Secretaries, exempt staff, full-time Governor-in-Council appointees and public servants during and after their period of public service, having particular regard to the need to ensure both public confidence in and the integrity of the governmental process and the need to attract to government individuals of high calibre from all walks of life.

And without restricting the generality of the foregoing the Task Force shall:

- (a) review available information with respect to the experience with existing conflict of interest and post-employment guidelines insofar as it is relevant to the establishment of policies and practices for the conduct of office holders during and after their period of public service;

- (b) review available information with respect to experience in this area in other political jurisdictions both domestic and international and in the private sector;
- (c) ensure that proposed approaches in this area are consistent with the Canadian Charter of Rights and Freedoms;
- (d) develop proposed approaches in this area in light of the principles of the Canadian Parliamentary system.

(c) Interpretation of Our Mandate

The "Gillespie Affair", as implied in your letter, was a catalyst leading to the formation of our Task Force, but this was a timely development, since we have concluded that the present rules and procedures require significant reformulation in any event. The policies and rules currently in force have developed in a rather piecemeal fashion, and contain serious problems both in interpretation and administration. As you stated, Prime Minister, policies in the area of conflict of interest and post-employment "need to be reviewed from time to time to ensure they are fair and workable."

Our terms of reference are clear, constituting one of the best statements of the central issue -- the need to balance ethical rules with the practical demands of recruiting qualified individuals to public service -- yet made. However, three subject areas required interpretation of the nature and extent of our mandate. These areas involved the public service, the judiciary, and Parliament.

First, with respect to the public service, your letter, Prime Minister, speaks of reviewing policies and practices which should govern the conduct of ministers, parliamentary secretaries, exempt staff, and full-time Governor-in-Council appointees, adding that "The results of such a study would be useful as well in reviewing policies in this area governing public servants". As will be seen from this report, we have recommended a system which we believe represents a significant new stage in the Canadian way of dealing with such matters, and in devising such an approach we have tried to do so on a comprehensive and integrated basis. For this reason, we have done more than "suggest approaches" which might be applicable to the public service; we have recommended a system which, if implemented, will accommodate the requirements of officials at all levels, including cabinet ministers, their exempt staff, parliamentary secretaries, full-time Governor-in-Council appointees and public servants.

Second, with respect to the judiciary, we are mindful of the fundamental importance in our system of government of the concept of judicial independence. For the public to have confidence in the administration of justice, our courts must be free and must appear to be free from government interference. Thus, while federally appointed judges come within the category of Governor-in-Council appointees, and therefore squarely within the terms of our mandate, we concluded that the present arrangements should remain unaltered. We refer to the arrangements whereby a Judicial Council has been created, as a result of amendments to the Judges' Act in 1975, to handle matters pertaining to the conduct of judges. Conflict of interest rules which are generally applicable to government office holders should not in our view be extended to the judiciary, which should continue to be governed by its own rules and procedures as developed pursuant to the Judges Act. This subject is discussed more fully in Chapter 16 as is the complex matter of "quasi-judicial" appointees, with respect to whom a proposal is made. In interpreting our terms of reference, we recommend the preservation of the current arrangements for maintaining judicial independence.

Third, with respect to parliamentarians, we are again faced with the concept of independence, this time of Parliament. An examination of our terms of reference shows that the only group excluded from our study is members of Parliament, i.e. Members of the House of Commons and Senators. However, it is from this group that Cabinet ministers and parliamentary secretaries, who do come within our terms of reference, are selected. For this reason, we thought it necessary to take note of the basic rules governing conflicts of interest and parliamentarians, as established both by statute and by those Standing Orders which govern such matters. These provisions are considered because they establish certain basic rules for ethical conduct on the part of members of Parliament, constituting the legal foundation upon which the further guidelines for parliamentary secretaries and Cabinet ministers have been built. In order adequately to address the conflict of interest rules respecting ministers of the Crown, it is necessary to take cognizance of rules which govern those same individuals as members of Parliament. This interpretation seems to us to be in accord with your direction to us, Prime Minister, to observe "the principles of the parliamentary system." Nevertheless, we recognize the traditional concern for the independence of Parliament, which suggests that any substantive proposals in this realm are more properly dealt with by parliamentarians, perhaps in the fashion outlined in the 1973 federal government Green Paper, Members of Parliament and Conflict of Interest.

(d) General Approach to Our Review

It was not within our mandate to investigate allegations of misconduct by public office holders, and we did not do so. The ethical standards of those who hold public office in the federal government of Canada and its agencies are high, and serious problems of misconduct are exceptional.

Our recommendations are not inspired by the need to establish new or more rigid standards of conduct or for more rigorous application of procedures to minimize conflicts of interest. We make this comment because our recommendation, later in this report, for the establishment of an Office of Public Sector Ethics might be misinterpreted as indicating the urgent need for a new "watch-dog" to protect the public interest. That would certainly be the wrong emphasis to place on it.

We have found, however, a clear need to develop the existing guidelines into a structure of principles and procedures which can be more readily understood by public office holders, Parliament and the public, which can be adapted to the circumstances of office holders with varying responsibilities, and which will result in greater consistency in application. We believe that our recommendations, if adopted, would not result in any significant increase in the bureaucracy or in costs of administration.

We have been conscious of the double responsibility laid upon us by our terms of reference, concerning "the need to ensure both public confidence in the integrity of the governmental process and the need to attract to government individuals of high calibre from all walks of life."

The two of us entered Cabinet, one in 1957 and the other in 1963, when there were no written guidelines for ministers or, for that matter, for appointed officials. (Although several departments had written guidelines, there was none that applied service-wide.) There were certain understandings that ministers would resign any outside employment or directorships and would take whatever steps they considered necessary to avoid conflicts of interest. There were, however, no requirements to divest oneself of securities either by their sale or by putting them into a trust. Neither were there any written rules relating to the activities of former public office holders. An honour system prevailed.

So far as we can recall, ethical standards of conduct in the federal government were as high then as they are today. The need to attract to government individuals of high calibre was present 25 years ago just as it is today. The difference is that today one of the reasons cited, especially by active businessmen, for not entering public service is that the present guidelines add to the financial sacrifices incurred while in office and to the difficulties of re-establishing oneself when one's public career is at end.

In Canada, a group of public men and women have had long and continuous service as members of Parliament, some of whom have been in and out of office as ministers of the Crown. However, we do not, as in some other countries, have many "professional politicians", that is, people who look upon political activity as a life-time career, with occasional interruptions when the electorate decides it wants a change. In Canada, the rate of turnover of members of Parliament at election time is high. Consequently, Cabinet has had many people who have spent a good part of their lives in professions, business or farming and who intend to return to private life when their political careers come to an end, voluntarily or involuntarily.

This state of affairs is good for the health of Canadian democracy. Those who govern us should not be a special group of professionals without a significant stake in the community. Surely we do not want people in government who are so narrowly involved in the Canadian community and so one-dimensional that they have no conflicting interests. We stress that it is not the existence of conflicts -- a natural and desirable state of affairs -- which is important, but rather how those conflicts are resolved. They must be resolved in favour of the public interest.

Our governors should continue to include people who are prepared to give up their private activities in which they have been successful and enter government for a time as a public service. It is no longer sufficient to say that successful people who have a sense of public duty ought to be prepared to accept the inevitable sacrifices involved in public office, whatever they may be. There is little point in having rules which add unnecessarily to those considerable sacrifices which are already part of the job.

We do not question the necessity of written rules of conduct and procedures to minimize conflicts of interest. We recognize the great change that has taken place in the public attitude towards government since the days when we first entered

Cabinet. A number of factors can be suggested for this change, but we do not need to speculate here as to which of the various causes is the most significant. It is enough that we deal with the reality, which is the existence of exacting standards of conduct expected from those in public positions. This is the context within which we approach this subject.

The existing guidelines for public office holders in the federal government of Canada are more comprehensive and rigorous than many of those in the provinces of Canada and in the other parliamentary democracies we have examined. It is very difficult to compare Canada and the United States in this respect, since their system of ethical rules is very different and elaborate and takes the customary American form of laws with specific penalties for breaches of the law, and all the rights of 'due process.'

Obviously, there can be no turning back to the time when we first entered the Cabinet. Guidelines may not have raised the already high standards of conduct of public office holders in the federal government of Canada, and they may not have had much to do with enhancing public confidence in government, but this is difficult to measure. In one sense, the experience of a decade is not yet sufficient to render a definitive verdict on the extent to which the guidelines have served a useful purpose. We have no doubt that written rules bring substantial (actual and potential) benefits, although their impact may be hard to quantify. Moreover, they have come to be accepted as necessary and their withdrawal at this stage would, in our opinion, only serve to reduce confidence in government.

There is every reason, however, for the government to strive to achieve simplicity, fairness and reasonableness in its approach to questions of ethical conduct, especially in the sphere of conflict of interest. Wise public policy will avoid imposing unnecessarily harsh restrictions which discourage individuals of high calibre and integrity from seeking, accepting or remaining in public office. Overly strict rules do nothing to enhance confidence in government, and can even become counter-productive when honest people are driven to avoid them because the literal application of such rules can produce manifestly unfair results. This is not just theory. We have seen and heard too many examples of how the present system is unreasonable because it lacks the discretionary element to adjust to circumstances, to differentiate between the important and the trivial, and to distinguish between the letter of the law and its spirit. This is examined in detail later in this report.

(e) Operation of the Task Force

The work of the Task Force has involved a wide-ranging and thorough review of a complicated subject. The matter of ethical conduct and the operation of modern government raises profound questions both in the philosophical and administrative realms. The work has been accomplished in fairly short order as a result of an intensive effort.

Following our appointment as Co-Chairmen, J. Patrick Boyer, of Toronto, a lawyer and author of several books dealing with legal and historical aspects of the matters under review by our Task Force, with experience in government at both the federal and provincial levels, was appointed Executive Director of the Task Force. Mr. Boyer wrote much of this report, in addition to performing his other responsibilities, and we wish to acknowledge his admirable work.

Secondments to the Task Force were arranged for several people from within the federal government having particular knowledge about conflict of interest matters. Judy Lockett, Head of the Policy Review Section, Policies and Procedures Group, was seconded from the Treasury Board Secretariat, to serve as Special Assistant to the Executive Director, and handled a range of research and administrative duties throughout the period of our Task Force's operation.

Seconded for briefer research assignments were Michael Vaughan, Senior Policy Analyst, from the Public Service Commission; and Brian Tannenbaum from the Auditor General's Office. The services of two retired senior public servants, Dino Cawadias and Russell Steward, were obtained for consultation and research on specific areas under review. Administrative Officer for the Task Force was Alan Quinn, of the Northern Pipeline Agency. Thelma Nicholson of the Privy Council Office acted as Recording Secretary for all our hearings, and Jim Ferguson of the Privy Council Office assisted with matters of administration. Pauline Sabourin served as Administrative Assistant to the Task Force. Exceptional secretarial services were provided by Denise Goudreau and Francine Chabot. Editing was done by Margaret Whitridge on secondment from the Public Service Commission. We are grateful for the assistance and dedicated efforts of each of these individuals.

In conducting our review, all the usual methods for gathering information were employed. A number of officials currently involved in interpreting or administering ethical

conduct policy in the federal Government were consulted. Indeed, we are particularly grateful for the "inside view" of conflict of interest matters which could only have been obtained from officials who were there at the time.

The Assistant Deputy Registrar General, G.J. Robert Boyle, and members of his staff, including the Director of the Standard of Conduct Advisory Group, Peter Herbert, provided us with continuing and invaluable collaboration during the course of our review.

An advertisement which explained the purpose of the Task Force and invited written submissions and phone calls was published in 111 daily newspapers and six special interest papers across the country. This advertisement appeared on two separate occasions, and generated a considerable response as well as many useful ideas, which are included in our report. The advertisement also brought in a variety of specific complaints, several allegations, and suggestions which were outside our mandate. We responded to all those who contacted us.

We wrote to all current ministers, members of Parliament, senators, deputy ministers and heads of agencies soliciting their views and opinions. Letters were also sent to a number of former public office holders.

The views of 65 Crown corporations, 134 private companies and businesses and 15 bargaining agents representing both the public and private sectors were solicited.

Numerous interviews were held with those who responded to the letters and to the newspaper advertisement. In addition, interviews were held with individuals who, over the last few years, have been the subject of alleged conflicts of interest.

Scores of informal "interviews" or discussions have also taken place over the past several months, as we met with individuals from the public and private sectors, to talk about conflict of interest issues, and to test ideas. Many of our ideas and insights resulted from dialogue with experienced and knowledgeable people as much as from formal study of materials.

The codes of ethics and conduct of various professional associations in Canada, and from several dozen Canadian business corporations, were obtained and studied.

Extensive liaison was conducted with the United States to study their system in terms of both legislation and their experience to date. The practices of the governments of the United Kingdom, Australia and New Zealand were studied on the basis of documents and reports received, and were assessed in terms of the requirements of Canada. We also reviewed the approaches taken by the provinces and municipalities of Canada.

We wish to extend our thanks to those who took the time to appear at hearings and make submissions with respect to conflict of interest matters; those officials who provided written information about the workings of conflict of interest rules for which they have particular responsibility; those from Crown corporations who responded to requests for information; those United States officials who were so co-operative; and those from the provinces and municipalities who sent information. A detailed listing of these individuals is contained in Schedule A.

The studies that have been done over the past 15 years, the works that have been prepared and the books that have been written by those specializing in this field were studied and analyzed. The history of the development of ethics in modern society was also considered.

Our approach and recommendations have been discussed with a number of people recognized as experts in this subject area, and we benefited in particular from the suggestions of Kenneth Kernaghan, Professor of Politics and Administration, Brock University; Robert Jackson, Professor of Political Science, Carleton University; Jeremy Williams, Professor of Law, University of Alberta; Roswell B. Perkins, who was Chairman of the New York City Bar Special Committee on Federal Government Service and Conflict of Interest; and Michael M. Harmon, Professor of Public Administration, George Washington University, Washington, D.C.

(f) Organization of This Report

In your letter to us, Prime Minister, you said that you intended to publish our report when it is submitted to you. For that reason, this report is presented in a form to facilitate public debate. It contains not only our analysis, recommendations and conclusions but also background and reference material, including an account of the history and development of the present federal conflict of interest laws and guidelines, a synopsis of those laws and guidelines, and a review of approaches to conflict of interest and standards of conduct in other jurisdictions.

As to terminology, we generally use the expression "public office holder" to mean anyone engaged in the federal public sector, or remunerated by the Crown in Right of Canada. In certain cases we use the term "non-elected public office holder" to refer to all of the above except ministers, parliamentary secretaries and ministers' exempt staff. These terms are more precisely defined in the draft Code of Ethical Conduct which appears in Chapter 12, part (d), of this report.

CHAPTER 2

THESIS AND THEORY

(a) Dual Themes: Integrity and Competence

Two consistent themes, of equal value, run throughout the work of the Task Force.

The first is that ethical conduct in the Canadian federal government must be beyond reproach. The second is that the federal government must be in a position to obtain the personnel it needs to meet the demands of contemporary government. Simply stated, the first theme involves integrity, the second, competence.

These two themes find expression in your letter to us, Prime Minister, when you observe, "It is essential that Canadians have trust in their government and its processes and in the calibre of individuals who commit themselves to public service. Nothing less than the quality of government in Canada is at stake."

The integrity of government is never a fixed condition, but a changing state which depends upon broad government programs, the attitude of those in the public service, the perception that government is addressing real needs of society and, of course, questions of conflict of interest. The integrity of government is an intangible quality, and at any given time some citizens may feel their government is acting with integrity while others might question it.

The operation of government in Canada is based largely on consensus, a willingness or tolerance to have the public sector carry out essential activities on behalf of society. For a society whose government is largely based on consensus rather than coercion, it is fundamental that the people retain their belief in the integrity of government. For their part, public office holders -- both elected and appointed officials -- must earn this confidence in their integrity, which is accomplished through countless actions day in and day out.

During the post-war years, there has been a gradual but substantial modification in the public's view of what standards of conduct are appropriate for government officials. The pace of

this change has accelerated in recent years. As Professor Kenneth Kernaghan has noted, this has been an important factor in disrupting the traditional pattern of response to instances of unethical behaviour.¹ Certain kinds of official conduct which used to be tolerated or mildly condemned now are considered unacceptable and punishable. This is especially the case in the area of conflicts of interest.

The seriousness of even a potential conflict of interest was recognized in a decision made in 1974 under the federal Public Service Staff Relations Act.² The adjudicator upheld the suspension of a federal employee who established a company offering services which could lead to a conflict of interest with his official duties. The Board found that the appearance of conflict was enough to establish a conflict of interest. According to the adjudicator,

It is not sufficient for the public servant or his associates to be convinced of their own innocence and integrity. Nor is it necessary to prove that they have been disloyal to the employer. Even in the absence of evidence of wilful wrongdoing, a conflict of interest or the appearance thereof can be easily recognized by an intelligent citizen as contrary to public policy.³

Reflecting on this high level of public life, where even the appearance of a conflict can be held to constitute a conflict of interest situation, we find it significant that contemporary Canadian society shows itself keenly aware of the conflict of interest problem. We agree that,

In a sense, conflict of interest is a luxury issue -- a matter that only an otherwise secure and established society

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1. Kenneth Kernaghan, Ethical Conduct: Guidelines for Government Employees, (Toronto): Institute of Public Administration of Canada, 1975), p. 4.
 2. Public Service Staff Relations Act Decision, Between Maurice Dudley Atkins, Grievor, and Treasury Board (Ministry of Transport), Employer. March 21, 1974. File: 166-2-889.
 3. Ibid., p. 30.

can afford to worry about. Only when grosser larcenies in government have been reduced to tolerable limits -- only when overt venality is uncommon enough to shock -- is it possible for a government to concentrate on potential for evil and to try to head off corruption at its sources.⁴

Yet to what extent is this luxury to be indulged? The Wall Street Journal, on July 15, 1983, reviewed several current cases involving ethical issues on the United States political scene, and in an editorial entitled "Ethicsgate", suggested the matter was getting out of hand:

At some point the untrammelled pursuit of virtue becomes irresponsible, even if it is not tinged with hypocrisy, as it so often is. This is something we need to think about -- we as a society: political adversaries, voters, book publishers, book buyers, news reporters, newspaper readers and television viewers. We have developed the habit of unleashing moral absolutism to devour anyone who reaches the public spotlight. Then we wonder why the best men and women are not found in public life, why those you do find there are often curious personalities with a moth-like attraction to the flame.

On our side of the border, this same concern that "the untrammelled pursuit of virtue" is becoming irresponsible has also been voiced. We received several submissions to the effect that irresponsible "investigative journalism" has detracted from the integrity of government in cases where this was unwarranted. Moreover, we were told that overreaction to conflict of interest and potential conflict of interest problems has made public service far less attractive. As a result, there has been some difficulty in recruiting people from the private sector.

4. Conflict of Interest and Federal Service, Report of the Association of the Bar of the City of New York, Special Committee on the Federal Conflict of Interest Laws (Cambridge, Mass.: Harvard University Press, 1960), p. 6.

Nevertheless, the fundamental importance of the media in "keeping government honest" is recognized. Here again a "dual" theme is encountered: irresponsible journalism can do great and irreparable harm. As someone has said to a journalist "It's your story, but it's my life!". Reporters who are careless with facts or conclusions in this area may do more harm than good. Yet at the same time, our concerns about "conflict of interest" might be largely absent if it were not for the media which bring matters to public attention, and heat them up to a point where action is required to rectify the problem and shore up public confidence in government. The media cannot afford to be any less mindful of the importance of integrity in government, and the need to maintain that integrity when and where it is warranted, than the others.

Turning to the theme of "competence", government in the latter part of the twentieth century has grown to unprecedented size and complexity. While some argue that it is unnecessary to have so large a public sector, and that government need not be as engaged in regulation or so active a participant in business activities, the reality which we must deal with is that the federal public service⁵ consists of some 234,866 employees (as of December 31, 1983) operating through some 27 departments of government and some 79 boards, agencies, tribunals, commissions and other organizations. In addition, 78 Crown corporations employ more than 250,000 people and the Canadian Armed Forces and uniformed personnel of the RCMP account for a further 100,000.

What is important is the enormous amount of government activity and the thorough-going system of government regulations and controls we have in Canada. At the same time, principally through the instrumentality of Crown corporations but in other ways as well, government has become a major player in the economy. These two developments point to an obvious source of conflict of interest. These activities are carried out not by robots or computers, but by human beings who, though in the public service, have other interests, relatives, friends, and ambitions.

Quite apart from the fact that increased government activity may generate additional conflict of interest problems, this expanded role of the state raises another important human dimension: to be competent, government must be able to attract the best and brightest from outside government, and must be able to adapt techniques and procedures which may not, until now, have

5. Departments and agencies listed in Schedule 1, Part 1 of the Public Service Staff Relations Act.

been considered part of the traditional role or approach of government.

The government has found increasingly that it can supplement its personnel needs by going "outside" for talent. As a result, government has developed new techniques for enlisting the services of individuals outside the public service. Intermittent and quasi-employment arrangements have become widespread for consultants, part-time experts, advisers with or without compensation, advisory committees, and independent contractors who do studies or consult.

It is at this point that the dual themes -- integrity and competence -- intersect. The relation between controls on conflicts of interest and government staffing is most evident where the demand for trained talent is strongest. A society may find itself with only one individual or firm qualified to design or supervise the development of a particular item of high technology. When matters arise involving that technology, the government has little choice but to turn to this one expert person or company for guidance, regardless of what their personal economic activities or affiliations may be.⁶ The issue of the shortage in certain areas of qualified or expert personnel was identified, for example, by Mr. Justice Hyde who expressly recognized that the shortage of labour economists made it likely that the government and the private sector would draw upon the same small talented pool for advice and consultation. In this context, it has been noted, "Vigorous enforcement of conflict of interest restrictions implies either the availability of alternative experts equally capable, or a deliberate choice to get along with the less capable. Most nations do not have the first and are unwilling to risk the second."⁷

It should be noted that a reason for the concern about ethical conduct is that there is, at present a poor public image of politicians, and public office holders generally. Allegations against a few or appearances of unethical conduct by some officials give support for the exaggerated view that all are corrupt. Thus we come to the question of whether existing restraints on conflicts of interest are adding substantially to the difficulties of operating contemporary government. Are present restrictions, aimed at the worthy goal of higher ethics, undercutting the government's efforts to attract needed talent?

6. R.V. Picard (1967), 65 D.L.R. (2d)658.

7. Conflict of Interest and Federal Service, op. cit., p.9.

The particular obstacle in attracting competent individuals into public service is the problem caused by those portions of the conflict of interest rules requiring divestment of personal investments and the giving up of other rights. While competent men and women may be willing to accept lower pay in public service they are becoming increasingly reluctant to divest themselves of their lifetime accumulations of investments and other rights of private industry and life. The evidence indicates that these divestment requirements have caused significant financial loss or hardship in a number of cases and that they are objectionable in the sense that such rules are perceived to be based on the premise that people are inherently unethical and cannot be trusted. Several people argued that this premise is faulty, because it automatically assumes that if individuals coming into public service retain any of their private interests or connections of a business nature, they will be unable to differentiate between the public interest and their private interest. On the contrary, where the holding of an office does not involve participation in the economic portfolios of government, or in the regulation of the commercial, mining or manufacturing sector of the Canadian economy, it should be recognized that there is substantial benefit to be derived from involvement in outside activity that maintains and stimulates an interest in the private sector.

Existing conflict of interest restraints have tended to hamper the recruiting of individuals to serve in senior government positions, and have likewise been a barrier encountered by political parties seeking candidates to run for public office. The country is currently in the midst of "fall-out" from this phenomenon. A number of people recruited into public office did not know until after they assumed these positions how extensive the rules are regarding divestment of assets and in some cases that there were guidelines. Some might not have taken on public duties if the rigour of the régime had been known in advance. Considerable time and effort, including administrative effort, are involved in having senior officials -- primarily those appointed by the Governor-in-Council -- make detailed reports and divest themselves of assets which could have little or no bearing on their official duties, or vice versa.

Certainly, private interest must never imperil or jeopardize public business, and in appropriate circumstances, confidential or public disclosure is highly beneficial and effective in achieving this goal. Yet we must not lose sight of the fact that rights of privacy are involved and must be weighed in the balance.

From those who have suffered under the existing rules, word is now trickling down to others in the private sector of the difficulties to be expected. As a result, the recruiting problems

for the federal government are likely to be more serious in the years ahead than they have been in the past. This can only be changed, in our view, by developing a greater measure of reasonableness in the rules, and establishing a clear-cut method for determining when and where rigid enforcement of rules may comply with the letter, but no longer the spirit, of the law, and thus become counter-productive.

Whatever the remedies may be to enhance recruitment, and thereby public sector competence, it must be remembered that neither of the dual aims can be safely subordinated to the other. The recruitment remedies cannot be allowed to undermine public protection against unethical practices in government.

We agree that,

The risk from inadequate staffing is immediate; the risk of corruption and loss of public confidence in governmental integrity is longer range. Neither risk can be tolerated. What is needed is balance in the pursuit of two objectives. The national interest demands an integrated policy for the long and for the short run. We need a policy that neither sacrifices integrity for opportunism nor drowns practical staffing needs in moralism. We need a careful regulatory scheme that restrains official conflicts of interest without creating pernicious side effects."⁸

It is our belief that such a balanced system can be established along the lines recommended in this report.

(b) Sole Focus: Standard of One's Conduct

The term "conflict of interest", which is an expression of relatively recent origin, is perhaps too limited or narrow a concept to embrace adequately the concern expressed in our mandate. Indeed, although we have from the outset been described as the "Task Force on Conflict of Interest", your letter to us, Prime Minister, does not use this expression, and our Terms of Reference only use the expression in reference to the current conflict of interest guidelines. The term used throughout is

8. Conflict of Interest and Federal Service, op. cit., p. 10-11.

"conduct". The single focus for examining these questions is the standard of one's conduct. By this, of course, is meant ethical conduct.

Some would devise government policy in this area by looking at a narrow range of conflicts; indeed some would define it in economic terms only. It is more positive and constructive to come to this subject with a broader, all-encompassing notion that we are really dealing with ethics, regardless of the situation or context within which a "conflict of interest" arises. Legal régimes and government policies in other jurisdictions which seek to focus too exclusively on conflict of interest, and thus end up defining in great detail the various instances in which particular conflicts might occur, seem, in their effort to define and particularize, to have lost sight of the main idea, which is that one should be ethical in conducting public business. This means, by Canadian ethical standards, that where a private interest intersects with the public interest, the conflict must be resolved in the public interest -- whether by resignation, divestment of assets, disclosure, disqualification from handling the matter, or other means.

In an earlier time, when, for example, the co-chairmen of this Task Force entered politics, the public was more prepared to give the benefit of the doubt to a minister or public official. In other words, there was confidence that such officials would give precedence to their public duties over their private interests. This is no longer so. The public has come to expect positive measures designed to remove or minimize the conflict of interests. This is now another component, therefore, of the main "idea": ethical conduct should be reinforced by rules.

This is not to presume that conflicts of interest will not arise; we cannot imagine the limited and circumscribed life one would have to lead never to be in a conflict situation. The real issue is how conflicts are resolved when they do arise. In some cases, we recommend that current policy continue to apply, whereby certain public office holders (such as Cabinet ministers) must divest themselves of certain properties and affiliations in order to hold office; this is simply "preventive medicine" since it eliminates in advance the types of conflicts that are inevitable and predictable for Cabinet ministers in modern government. In the other cases, however, where the problem cannot be foretold and removed in an anticipatory fashion, it is necessary to fall back on ethical principles to guide individuals out of their conflict of interest dilemma. To assist in this process, it is important to state with simplicity and certainty rules of ethical conduct, which we propose be stated in an Act of Parliament.

These rules can perhaps be boiled down to a single precept, although it may be too pithy to find its way into an Act of Parliament: "Don't do anything you would be embarrassed to read about in tomorrow's newspaper". This counsel is a relevant guidepost for many people.

"Ethics" is a word derived ultimately from the Greek word "ethos", meaning character. It has come to refer to "a set of moral principles or values", but it may be thought of as something much more penetrating than a moral code. It refers to the very essence of one's character -- one's integrity, the intangible part of us motivating us to be and do the same when people are not watching as when they are.

The ultimate answer to ethical problems in government is to have honest people working in a good ethical environment. No web of statute or regulation, however intricately conceived, can hope to deal with the myriad possible challenges to a person's integrity or his or her devotion to the public interest. Nevertheless, formal regulation is required -- regulation which can lay down a clear statement of policy, punish venality and double-dealing, and set a general ethical tone for the conduct of public business.

(c) Policy Objectives and Underlying Principles for Standards of Conduct

In focussing on standards of conduct, at least seven policy objectives and underlying principles are involved:

- 1) impartiality, fairness and equality of treatment toward those dealing with government;
- 2) assurance that decisions of public importance will not be influenced by private considerations;
- 3) efficiency and economy in carrying on the business of government;
- 4) maintenance of public confidence in government (including the matter of appearances);
- 5) prevention of the use of public office for personal advantage, directly or indirectly;
- 6) encouragement of a positive and professional attitude towards government service; and

- 7) facilitation of movement of individuals between the public and private sectors.⁹

(d) Three Touchstones for Evaluating Standards of Conduct Rules and Procedures

One of the characteristics of the current guidelines and statutory provisions dealing with conflict of interest at the federal level is their disorder. Policies have been developed, by and large, as sporadic responses to particular evils. A patchwork quilt of rules and procedures has resulted, each component of which may be quite understandable and logical, but which, taken together, have resulted in a system which is unnecessarily complex, in many cases unfair, and in some instances unreasonable.

Based on this assessment as touchstones for evaluating standard of conduct rules and procedures, and in particular for devising a new system to replace the one presently in operation, we would continuously ask three questions about any rules or procedures, either existing or proposed: "Are they simple? Are they fair? Are they reasonable?" These concepts of simplicity, fairness and reasonableness each require elaboration.

Simplicity. Some of the best rules for ethical conduct (such as the Golden Rule: "Do unto others as you would have them do unto you."), are those stated precisely and simply.

There is no evidence that greater detail and precision in drafting such rules in fact contributes to more ethical behaviour; indeed, a case to the contrary can be made. It appears that there will always be a small group of individuals who are intent on cutting corners, serving their selfish ends, and breaking the law. Presenting such individuals with a complex thicket of laws and procedures offers them places to hide or loopholes through which they can escape.

In short, the urge to write complex rules to govern ethical behaviour is counter-productive in two ways: it does not provide an adequate check against those intent on breaking the rules, and it mitigates against effective education of those coming into the public service about the rules which govern conduct. The simpler the rules, the more readily they are understood, and the less scope they give for evasion.

9. See Roswell B. Perkins, "The New Federal Conflict of Interest Law", Harvard Law Review, 76, No. 6 (April 1963), p.1118.

Guidelines currently in force dealing with conflict of interest include the supplemental codes written at different times by different people for the departments, agencies, and Crown corporations listed in Schedule B of this report. Taken as a whole, the present system is unnecessarily complex. Not only is there an intimidating volume of material, but definitions and expressions are not always consistent from one code to another. Certainly the procedures seem to be susceptible to considerable simplification.

Fairness. The present conflict of interest guidelines are unfair it seems to us in two ways, namely in the nature of the express provisions which exist and in the nature of the procedure which is followed.

When the generally applicable conflict of interest guidelines were promulgated for the public service in 1973, Treasury Board invited individual departments, boards and agencies to develop supplemental codes where considered appropriate. A number were developed subsequently, but this has not been done in all cases. The result is that two public office holders in roughly similar positions in different departments may be subject to different rules: one, to only those rules of general application in the 1973 guidelines, and the other, to both those 1973 rules and the further rules developed within the department. It seems unfair that two public office holders in similar positions should be so treated. There remains the problem of punishing those who contravene the guidelines. Even if all codes were identical, deputy ministers and heads of agencies would still have the authority to discipline offenders as they saw fit. It would be very difficult, and quite inappropriate, to establish levels of discipline to be applied to classes of cases. In keeping with the functional approach advocated throughout this report, it is considered that appropriate sanctions are best decided by the deputy minister or agency head concerned or his or her delegated representative. This theme is somewhat parallel to the judicial system, where, although consistency of penalties is an objective, there will always be some deviation from case to case which will cause a different judgement to be rendered.

As to procedural matters, even in departments where the rules (as expressed in supplemental codes) are essentially the same, the deputy minister of one department may favour strict vigilance in this area of ethical conduct, while a deputy minister in another department may be comparatively indifferent to the subject and delegate his responsibility for such matters. This can mean that a similar problem arising in two different departments will be treated on a different basis in each. Government policy must be administered through individuals and this human dimension will inevitably generate differences both in interpretation and enforcement. It is also recognized that

matters of discipline and related enforcement of conflict of interest rules must largely be left in the hands of the deputy minister or head of agency concerned. However, we wish to point out the inherent, yet inevitable, unfairness of having similar rules applied differently in different departments of the same government.

Our recommendation is that such matters continue to be the administrative responsibility of the deputy minister (or head of commission or agency) but that, in order to move closer to administrative fairness, procedures recommended later in this report could help even out discrepancies which appear to exist when current practices in some departments are compared with others.

Reasonableness. The real test of a law is not how it is stated in the abstract, but how it is applied in particular situations. We have heard considerable evidence, from a wide range of individuals subject to the current conflict of interest guidelines, that the general principles or rules contained in the guidelines may sound fine, but in specific applications they often have unintended, even harsh and mean, results.

No reader of this report should jump quickly to the conclusion that we have heard from dishonest people who would prefer not to be brought to justice, given a choice in the matter. On the contrary, many public officials of high reputation and unchallenged integrity have found that the enforcement of the letter of the law is increasingly destructive of what must be the intended spirit of the law in this area.

Three examples follow:

- Under a rule which stipulates that a public official must not own shares of companies in the communications field, a public office holder was required to divest herself of ten Bell Canada shares. To accomplish this, a trust was established, for the purpose of holding these shares and the cost of setting up the trust exceeded the value of the shares. The employee could have sold them and would have done so except for their sentimental value. In light of the fact that some two hundred million shares of Bell Canada are held by the Canadian public, it seems inconceivable that holding only 10 shares would influence the employee in a way that would subvert any public interest. Yet the rule had to be enforced in a way which all parties concerned, including the officials enforcing it, considered unreasonable. The problem, obviously, is the absence of a de minimis rule which would allow officials administering the guidelines to decide, in a particular

case, that a matter was inconsequential and would therefore not be subject to the requirements of the guidelines.

If these officials had discretionary power to resolve these de minimis matters, it would be sufficient to indicate to the employee in writing that continuing to hold a few shares would not offend the spirit of the guidelines, but that she should report any subsequent changes in her shareholdings.

- Another case involved a Governor-in-Council appointee who encountered problems because he was not permitted to engage in certain types of financial activity. Some years prior to his first appointment by Order-in-Council his father died leaving a modest estate under which his mother received a life interest in income with the capital to be divided among the public office holder and his two brothers on the mother's death. At a time when "estate splitting" had greater advantages than it now has, his father had transferred assets to the mother's name so that a capital amount equivalent to the capital value of the estate was held in the name of the mother. On the mother's death, barring a change in the established arrangements, her estate would pass to the public office holder's two brothers and himself.

For administrative purposes, these assets were treated as a single fund. The official, his mother and his brothers were trustees of the father's estate and all were interested in the administration of the total fund. The assets comprising the fund were administered under a management contract by a major Canadian investment firm given absolute discretion under the investment guidelines that formed part of the contract. The official and his brothers met annually with a representative of the investment firm to review performance, to discuss the investment guidelines and, where appropriate, to revise them and examine the outlook for the forthcoming year.

This information was disclosed as required to the Assistant Deputy Registrar General responsible for administering the guidelines and it was indicated that he had to refrain from managing stocks, shares or securities of public corporations or "... giving advice to others concerning such assets". He was advised not to take part in discussions with the firm regarding investment policy or cancellation of the contract should the firm's performance be unsatisfactory (in the context of dealing with publicly traded shares).

The estate, with his mother's investments, had a total value of substantially under \$1 million. Investments were in shares or securities of publicly traded corporations and the portfolio was well balanced so that the interest in any corporation was miniscule. His mother had no business experience so it was logical that he and his brothers, as co-trustees and residuary beneficiaries, should take at least a limited interest in the effective management of the fund.

The present guidelines, concludes this individual, do not provide adequate scope for common sense and good judgement being taken into account by public office holders in the analysis of potential conflict situations. Nor do they recognize that normal family obligations and interests might be excluded from the routine restrictions.

To cover the circumstances outlined in this second example, it again seems reasonable to apply a de minimis rule, which could be "staged" for different levels or financial amounts involved. It could be applied so as to allow for direct holdings and participation in management up to a stated limit that could be indexed and would allow for the kind of interest and involvement this official had, where major management responsibility rests with a professional manager under a written contract. Stipulations regarding abuse of information obtained in the course of public service employment could be written into the arrangement.

- A third example involves a Governor-in-Council appointee, who also encountered an experience involving his personal responsibility to manage a family estate. What he found most exasperating was the extensive amount of "red tape" involved -- the time that had to be spent with representatives of the Assistant Deputy Registrar General, and the thick file of correspondence built up over trivial matters because the administrators of the guidelines had no discretionary power to rule on de minimus matters.

We do not wish to conclude on the suggestion that unreasonable is the stock-in-trade of the Assistant Deputy Registry General; we have been made aware of cases where just the opposite is the case, with those subject to the guidelines praising the ADRG's flexibility and reasonableness to meet the spirit of the rules. Our point is not that there is a problem with the ADRG, but with some aspects of the guidelines he has been called upon to administer.

(e) The Nature of a Conflict of Interest

When the private interests of an individual are at variance with his or her official duties and responsibilities to the government, a conflict of interest exists. It is this point of interference or intersection between competing interests that requires analysis.

In extreme cases, the private interest can involve a criminal motive, and would result in cases where the individual seeks to use a position in government, or confidential information received in government, in a fashion proscribed by law. This is in the realm of Criminal Code provisions which address undue influence, bribery and corruption of public officials. Even though the initiative to bribe or corrupt comes from someone outside the public sector, it can only succeed when a public employee or official succumbs to the overture and participates in an unlawful act, which normally requires criminal intent on the part of the employee or official.

Moving along a continuum, away somewhat from these extreme cases involving criminal intent, another category of offences -- also dealt with in the Criminal Code -- concerns acceptance of a gift by a public official. Acceptance of the gift may be considered in law to be a conflict of interest even in the absence of corrupt intent. The act of accepting a gift or inducement is sufficient to constitute the offence, since it is seen as the basis for interference with the public interest on the grounds of privately received consideration.

Further along this same continuum, are interactions between public and private interests which are not criminal but where private economic or other interests of the government employee or official come together with official duties which he or she must perform.

Private and public interests need not be in competition or conflict for an ethical problem to exist; the public interest could be abused equally where private interests of an office holder coincide with the public interest so as to mesh together, with the result that in serving the public purpose the individual benefits privately as well. While one cannot condemn such arrangements in the abstract, "conflict of interest" can in some cases mean "compatibility of interest". Particularly in cases where economic interests are involved, there is a risk that more is taking place in the discharge of a public function than may meet the eye.

Moving further along this continuum on which public and private interests intersect, we come finally to the opposite extreme from the conflicts involving criminal intent -- to those

situations where all that is involved is the appearance of a conflict. This is the most nebulous of areas, although it, too, has become the subject of laws. For instance, there are statutory provisions which prohibit participation by public servants in political activities, since this would appear to impair their subsequent ability to carry out official business. As well, there are rulings such as the Public Service Staff Relations Act decision, between Atkins and Treasury Board in 1974, which recognized the seriousness of even a potential conflict of interest, when a federal employee who established a company offering services which could lead to a conflict of interest with his official duties was suspended, a suspension which the adjudicator upheld. Finally, there is policy as embodied in provisions such as the original conflict of interest guidelines contained in Order-in-Council PC 1973-4065 which stipulates that a public servant must act, and appear to act, in the public interest in the discharge of his or her duties.

Beyond this spectrum of conflicts of interest lies a range of activities which would be considered unethical, whether practised by public office holders or anyone else. On the other hand, some actions which fall within the broad band of conflict of interest regulations as they currently exist, do not seem immoral or improper in a personal or subjective sense.

In this wide field of ethics and human conduct, our interest is limited to the permanent and endemic problem of all governments -- the continuing problem posed by the clash between the personal and public lives of officials. Some of the experts who have written on the subject of conflict of interest in government have chosen to restrict the topic to conflicts between a public office holder's duties and his or her personal economic interests. Yet people are driven by many motivations, by no means exclusively economic in nature, and we prefer to take a broader view in considering conflict of interest. We do not try to itemize all the particular types of private interests (such as economic, family, religious, partisan, corporate, institutional, ethnic, sexual and so forth) which may motivate individuals, believing it wiser to focus on ethical conduct in situations where public interests and private interests (of whatever nature they may be) intersect.

Still, some limits are appropriate in defining "conflict of interest". For example, the House of Commons Standing Committee on Public Accounts¹⁰, in dealing with Canadair last

10. Twenty-Second Report (The Canadair Report) of the House of Commons Standing Committee on Public Accounts, tabled November 17, 1983, p.2.

November, has drawn attention to the problem of "conflict of duties" in these terms:

Your Committee has serious concerns about the significant part played by the shareholder's representatives both as directors on the board of the company and as public servants advising the Minister. This resulted in a conflict of duties, whereby:

- (i) as directors, these public servants were instructed to represent their Minister's views; and
- (ii) also, on behalf of the board, they were called upon to influence department officials to provide financial assistance to the company.

This conflict of duties, in your Committee's view, substantially weakened the objectivity of the board and its accountability to the shareholder. In addition, as government representatives, they may have had a disproportionate influence on the decisions made by the board of directors.

While this "conflict of duties" is a significant problem, it is excluded from the definition of "conflict of interest" because we feel it does not pertain to ethical conduct but rather to structural arrangements whereby some individuals in Crown corporations are called upon to serve two masters. The test of "reasonableness" has been chosen carefully and the term "flexibility" was rejected in this context. To state that conflict of interest rules should be "flexible" would be to invite distrust from members of the public who would see this as a formula for bending the rules where necessary to suit friends of the government, or for purposes of "administrative convenience" within the public service which is not what is intended. Our aim is to see that the rules which exist can be applied in such a fashion that all concerned -- the parties directly involved, and members of the general public -- can be satisfied as to the probity of the situation.

If well-intentioned men and women of integrity in the public sector find that the rules, in their application, are so unreasonable as to suggest "the law is an ass", they might have little compunction about breaking those rules. In fact, the irony is that these people of integrity could feel justified in circumventing the rules by failing to disclose certain information, or failing to divest of certain interests. In short,

there is a tolerance level beyond which one cannot push rules of this kind without the entire exercise becoming counter-productive. This is particularly so in dealing with a large number of public-spirited individuals who are trying their best to fulfil their public duties and live in concert with their many different personal and private interests. We seek to resolve this dilemma by ensuring that the rules -- particularly the procedures followed to minimize conflict of interest -- are reasonable.

CHAPTER 3

IMPROPER FORMS OF CONDUCT

FOR THOSE IN GOVERNMENT SERVICE

(a) The Need for a Clear Statement of Prohibited Activity

Because we have chosen to cast this subject in terms of ethical conduct on the part of those in public service, it is necessary to address the kinds of activities and forms of conduct which we consider unethical. It is not sufficient to state simply that one should act ethically; there must, as well, be a short and succinct statement of prohibited activity. People must know the outer bounds of permitted activity, so they can govern themselves accordingly.

We have already expressed deep concern about trying to write rules too specifically, both because of the problems this creates for educating public servants as to the nature of the rules and the difficulty of trying to envisage in advance and provide for every particular type of improper conduct that the human mind is capable of devising.

Accordingly these types or categories of improper conduct are stated in general terms, so that they are applicable to all kinds of problems that might arise. At the same time, the simplicity of these rules can make them meaningful in any particular case. The approach followed was described by Secretary of the Treasury Board, G.F. Osbaldeston, in the Treasury Board Circular of December 31, 1973, to deputy ministers and heads of agencies on the subject of standards of conduct for public service employees. Mr. Osbaldeston stated:

In developing any guidelines, the first question to be faced was how comprehensive and detailed they should be and whether much detail would help employees to identify potential areas of conflict. It is believed that a detailed set of guidelines in the Order-in-Council would be neither appropriate nor desirable. Any attempt to identify the totality of potential areas of conflict would be a task of great magnitude, could never be totally

comprehensive and would require constant review and interpretation. Instead a more workable approach has been taken to identify certain principles, the violation of which would clearly establish a situation of conflict of interest. With these published principles, the overall intent is established and actual situations can be scrutinized to determine whether the principles are respected.

(b) Nine Forms of Unethical Conduct

Of the nine forms of conduct described below, the first six (self-dealing by a public office holder, discretionary transfer of economic value to a public office holder from a private source, assistance by public office holders to private parties dealing with government, post-employment assistance by former public office holders to private parties dealing with government, private gains derived from information acquired in an official capacity, and private use of government property) we consider to be unethical conduct.

The last three forms of conduct (partisan political activity by a non-elected public office holder, criticism of government policy, and conduct unbecoming to one's public position) while not in the same realm of ethics, are, in our view, improper forms of conduct for those in the public service.

Partisan political activity, criticism of government policy and matters of personal conduct can lead to conflicts of interest, in the sense that one's personal or private views and practices can become entangled inappropriately in the discharge of one's official public duties.

A detailed discussion follows of each of these nine forms of unethical or improper conduct.

1. Self-Dealing by a Public Office Holder

We consider it to be clearly unacceptable and unethical conduct for a public office holder to take some action, in his or her public capacity, which involves dealing with himself or herself simultaneously in his or her private capacity.

This situation would arise most typically where the public office holder is involved in the awarding of a contract to a company which he or she owns in whole or in part. Another example would involve a government scientist or other expert consulting to the government who develops specifications for a

highly specialized piece of equipment which can actually be produced most expediently by his or her own company.

As the concept is currently applied to Cabinet ministers, the Guidelines for Ministers of the Crown stipulate a number of prohibited activities which preclude any form of dealing by the minister with himself or herself in a personal capacity. For example, ministers upon appointment must cease to engage in the practice of a profession or in the management or operation of any business or commercial activity, or in the management of assets except exempt or discloseable assets. They must cease to serve as paid consultants. They cannot retain or accept directorships, or offices in commercial operations, nor can they serve any longer as active members in unions or professional associations.

The principle here, in its broadest application, is as follows:

Public office holders must not have personal interests which would be affected particularly or significantly by government actions in which they participate.

2. Discretionary Transfer of Economic Value to a Public Office Holder From a Private Source

We have had extensive discussions concerning the acceptance of gifts, money, and other benefits, and have noted, sometimes with consternation, the efforts made elsewhere to delineate and protect against the many different ways in which attempts may be made to suborn public office holders. The possibilities are limited only by one's imagination, and run the gamut from meals to entertainment, gifts, travel, weekends at a hunting or fishing lodge, "sweetheart" arrangements on loans and so forth.

The concept of the "discretionary transfer of economic value" encompasses, in a single expression, all of these possibilities. In this context, we are referring to the discretionary (as distinct from non-discretionary such as pension benefits or royalty payments) transfer of economic value from a private source to a public office holders. In its most offensive form, this transfer of value can constitute bribery, in which case the Criminal Code governs.

The essence of bribery, as noted by Roswell B. Perkins, is its quid pro quo aspect with the "quo" having to do with conduct in office: something of value is given in return for an express or tacit undertaking on the part of the public office

holders to help bring about certain governmental action or inaction.¹ The comprehensive bribery provisions in the Criminal Code are essential to complement an effective structure for dealing with conflict of interest problems, although the conflict of interest principle considered here addresses behaviour short of bribery. In fact, the transfer of economic value to a public office holder may involve no criminal intent, and may be done with the most laudable of motives. The obvious problem is, however, that regardless of the donor's intent, the result of accepting such transfers can involve a range of responses by the public office holder from gratitude to economic dependence and can jeopardize the recipient's ability thereafter to deal impartially, fairly and equally with such donors.

The discretionary transfer of economic value to a public office holder from a private source is most commonly referred to in the existing guidelines as a "gift". For instance, ministers are required to disclose in the Public Registry "any personal gift or other benefit of a value exceeding \$200 which they receive from any person not connected with them by blood relationship, marriage or adoption, together with the name and address of the donor." Official gifts and hospitality received from other governments and hospitality received from personal friends are not subject to this rule. All gifts or benefits exceeding \$200 in value, other than official gifts or benefits, are to be declared to the Assistant Deputy Registrar General within 30 days of their receipt for disclosure in the Public Registry.

The Public Servants' Guidelines do not directly deal with gifts, nor do Governor-in-Council Guidelines. There is no provision on the subject of gifts in the Public Service Employment Act. However, in the December 31, 1973 Treasury Board Circular to deputy ministers and heads of agencies on the subject of standards of conduct for public servants, it was stated that the acceptance by public servants from persons having dealings with the government of sporadic or casual benefits such as hospitality or small gift items may usually be consented to by deputy ministers or branch heads "where such benefits or advantages are within the bounds of propriety, or a normal expression of business courtesy or advertising or are within the normal standards of hospitality and are not such as to bring suspicion upon the public servants' objectivity."

This general provision was subsequently elaborated upon, most recently in an amendment to the Personnel Management Manual

1. Perkins, op. cit., p. 1119.

of Treasury Board. The latest policy statement was issued November 24, 1983 to clarify government policy regarding the acceptance by public servants of benefits, advantages, fees, honoraria or favours which are offered by third parties, particularly where the provision of free or reduced transportation fares, and fees or honoraria for speeches or similar activities are involved.

As a result of this policy revision the rules² now read:

Public servants are prohibited from accepting benefits, advantages, fees, honoraria or favours arising out of activities associated with their official capacity, or the performance of their duties, which are offered by third parties. Such acceptance could not only compromise the position of the employee and the department but, under certain circumstances, could constitute an offence under the Criminal Code. However, the acceptance by public servants from persons having dealings with the government of sporadic or casual benefits such as hospitality or small gift items may usually be consented to by deputy heads, where such benefits or advantages are a normal expression of business courtesy or advertising, or are within the normal standards of hospitality, and are not such as to bring suspicion upon the public servant's objectivity. The acceptance of any gift should be confined to promotional items of nominal value. The degree of hospitality accepted should be limited to the degree that existing authorities permit the extension of similar hospitality at government expense.

This policy is then elaborated upon as follows:

Gifts or offers of hospitality not covered above should be declined. Gifts

2. As contained in Volume 1 of the Personnel Management Manual, Chapter 3, Section 5.5.

should be returned with a letter of appreciation explaining the departmental policy. Perishable gifts could be sent to a charitable organization and the donor informed. Where a department pays the travelling expenses of an employee who undertakes in his or her official capacity to address a meeting (or participate in similar functions) of a group or organization and the employee receives a fee or honorarium for such services from the group or organization involved, the employee must report it to the department and return the fee or honorarium to the group or organization. However, if it is not possible to decline or return such fee or honorarium, or if such action is likely to be construed as being discourteous, the employee must either reimburse the department for the travelling expenses paid by the department or remit the fee or honorarium to the Crown.

Public servants should also be cautioned against acceptance of advantages or favours such as free or reduced transportation fares or accommodation for themselves or their families. In addition, the travel industry, from time to time, engages in promotional activities ranging from credit vouchers exchangeable for services at various hotels, to discount coupons applicable to future flights. Since the employer is responsible for transportation and other costs related to travel on official government business, any vouchers and coupons resulting from such travel are the property of the Crown and must be submitted by the employee with the travel claim.

Nevertheless, where the explicit duties of a position require an employee to board and travel on a particular commercial vehicle (e.g. air inspectors) and industry practice is to provide free travel for this purpose, the employee may accept, provided that such acceptance has been authorized in advance by senior departmental

officials. In such cases, free passes which could also convey a personal benefit are not to be accepted or used. Instead, departments should request commercial carriers to provide identity cards which specify that passage is solely for inspection/regulatory purposes.

Underlying these provisions are provisions such as Section 110(1)(c) of the Criminal Code, which makes it an offence for an official or employee of the government to demand, accept or offer (or agree to accept) from a person who has dealings with the government a commission, reward, advantage or benefit of any kind directly or indirectly, by himself or through a member of his family or through anyone for his benefit, unless he has the consent in writing of his deputy minister or head of agency. In this context, a "person" includes any individual, group, corporation or Crown corporation.

The principle, in its most abstract formulation, can be stated as follows:

Public office holders must not accept or solicit transfers of economic value from private sources, even though no bribery is involved, if the transfer is at the discretion of the donor as distinct from being pursuant to an enforceable contract or property right of the public office holder.

3. Assistance by Public Office Holders to Private Parties Dealing with Government

The two types of conduct described above involve public office holders operating in their official capacity, but a third and different situation involves them acting in a private role, but doing so in a government forum or in relation to a matter involving the government.

Because the operations of government today are so widespread, it is conceivable, indeed likely, that many public office holders will have interest in a subject or activity wholly unrelated to his or her specific duties, but which nevertheless involves some dimension or aspect of the government of which he or she is a part. It seems to us unethical for a public office holder to undertake private activities in relation to government matters, no matter which of the countless functions of the federal government is involved.

It is clear that this concern applies to employees and officials in the public service, not to Cabinet ministers or parliamentary secretaries who, as elected representatives, perform

such interventions as part of their role in the political process (nor to certain members of a minister's exempt staff who perform this role on behalf of their minister nor ministers appointed from the Senate).

The principle here can be stated as follows:

Non-elected public office holders must not, without prior approval of their superior, step out of their official roles to assist private entities or persons in their dealings with the government.

4. Post-employment Assistance by Former Public Office Holders to Private Parties Dealing with Government

This fourth form of conduct is closely related to that of public office holders assisting private parties dealing with government, except that in this case we are considering the position of former public office holders.

The "post-employment problem" -- that is, the scope of permitted activities for a public office holder who has left the public service -- is one of the most difficult questions we have had to grapple with in reviewing government policy. The complexity is not only in the realm of defining what constitutes unethical conduct, but also in translating generalized precepts into actual situations.

When public office holders leave government, they take with them two kinds of information: (1) general understanding and knowledge of the way government operates, its structures and personalities; and (2) specific confidential information about government policy or about entities regulated by the government. Our view is that the more knowledge of the first type that is carried to the private sector, the better. It is more efficient for government and the private sector to understand correctly how the other operates, and for the private sector to know the appropriate procedures to follow in dealing with government, and which officials to deal with on a particular matter.

The second type of information -- that which is sensitive or confidential -- is likely to become dated in a relatively short time. However, to the extent that it can give an unfair advantage to particular interests, we believe it is improper, and in some respects unethical, to transmit this information out of the government. Of course those who have been in government have taken an oath or affirmation of secrecy with respect to information acquired in the course of their work, and this is one factor to be taken into account. Another factor is that public office holders have a fiduciary duty to government, based on the public trust implicit in the office or position they

hold in the public sector, and this fiduciary duty arguably must be respected in the post-employment period.

Post-employment activity is examined in detail in Chapter 14, and we made a number of recommendations. For present purposes, the basic principle can be stated simply:

Within certain narrow and stipulated limits of time and degree of connection with their former responsibilities, former public office holders should otherwise be free to assist private entities or persons in their dealings with government.

5. Private Gain Derived from Information Acquired in an Official Capacity

The type of information which public office holders take with them upon leaving public service has been discussed. We now turn to a different issue concerning the use of government information by those in the public service.

Representations were made by groups concerned about private use of government information. For example, we heard from employees of the Department of Transport, Aviation Safety Branch, in relation to the conflict that arises when, drawing upon information acquired in the course of investigating airplane and helicopter crashes and related aspects of aviation safety, they hire themselves out as consultants on their own time, or are called upon as expert witnesses in litigations arising out of airplane crashes. Likewise, we heard from the Meteorological Branch of the Department of Environment with respect to employees who, on their own time, broadcast weather reports and meteorological analysis on radio or television.

Another example would be an employee in the Department of Agriculture who uses statistics collected on crops, prior to their public release, to speculate on grain futures. While such speculation may not harm the government or cause detriment to any private party, it involves unethical conduct in relation to the general public, in the sense that the employee has used for private gain information acquired in an official capacity. This information belongs to the public and he or she should not be able to use it for private purposes until it has been generally released to the public, at which time all Canadians are in the same position as the public office holder to use it.

From the specific types of problems drawn to our attention, it appears that to draft anything more than a general rule against misuse of information may create more problems than it solves. We recommend later that supplemental codes of conduct

be continued in government departments and agencies which already have them, and that supplemental codes be established in those departments and agencies which do not have them. Within the framework of the general principle set forth below, detailed rules respecting use of public information should be left to specific departmental and agency regulations.

A rule governing use of government information must be written with two cautions clearly in mind. As stated by Roswell Perkins, "A prohibition against the misuse of information, as it applies to the individual, treads dangerously near the legitimate use of know-how and experience acquired in a Government post". On the other hand, as it relates to the public interest, "such a prohibition borders on curbing freedom of the press."³

The general principle in this area could be stated:

Public office holders must not take personal advantage of information obtained in the course of their official duties until it has become generally available to the public.

6. Private Use of Government Property

The improper form of conduct just considered involves private gain derived from information acquired in one's official capacity, in other words, misuse of intellectual property. Here we consider misuse of all other forms of government property.

A range of services and facilities are placed at the disposal of those working in the public sector, in order to enable them to discharge their official functions properly. Public office holders have a positive duty to protect and conserve government property, including equipment, supplies, and other property entrusted or issued to them.

The present guidelines in their various forms only deal with such matters by inference, which has led to some problems for individuals trying to resolve conflicts and having a hard time discovering where the public interest lies. Some supplemental codes in departments deal with it; others do not.

While it is not always possible to segregate completely one's personal and public lives, the need for a clear and simple rule in this area is manifest to ensure public confidence that

3. Perkins, op. cit., p. 1122.

private business is not being transacted at public expense, and in order to give better guidance to public office holders in some of the grey areas currently causing practical problems and difficulties in legal interpretation of the guidelines.

The principle here can be stated as follows:

Public office holders must not directly or indirectly use, or allow the use of, government property of any kind, including property leased to the government, for anything other than officially approved activities.

7. Partisan Political Activity by a Non-Elected Public Office Holder

Any activity of a political nature which brings into question the professionalism of a public office holder would imply a conflict of interest situation. The conflict here is not of a financial or material nature, but rather in the nature of a breach of trust, calling into question the doctrine of a politically neutral and impartial public service. Such questioning may have the end result of rendering the person unable to carry out the job of a public office holder because of a public perception of bias.

It is essential that the advice which public office holders offer their superiors or ministers be as objective as possible, and proffered without regard to partisan considerations. Individual public servants, their superiors and their ministers must be confident that this advice has not been politically motivated. Each Canadian must be confident that public office holders who provide them services are impartial in the execution of their duties. This relationship of trust cannot be guaranteed merely by the passage of law; it is earned daily through their conduct. Not only must they be non-partisan, they must appear to be so.

Under the present régime, which we propose should remain unaltered, restrictions on political activity do not apply to ministers, parliamentary secretaries or ministers' exempt staff, but normally apply to public servants who are working in the offices of ministers.

Strict adherence to the traditional doctrine of political neutrality in a parliamentary system of government has certain requirements:

- politics and policy must be separated from administration;

- public servants must be appointed and promoted on the basis of merit rather than for partisan reasons;
- public servants must not engage in partisan political activities;
- public servants must not express publicly their personal views on government policies or administration;
- public servants must provide straightforward and objective advice to their political masters, in private and in confidence, and this anonymity must be respected by the politicians; and
- public servants must execute policy decisions loyally and zealously with due regard to the philosophy and programs of the government of the day and notwithstanding their personal opinions.

Professor Kenneth Kernaghan has pointed out that "some of the requisite conditions have never been met; others have been altered to keep pace with changing political, social and technological circumstances."⁴ It is true that both politicians and public servants participate actively in policy development, with the result that the line between politics and administration has become increasingly indistinct.

A number of appointments, of course, are not made by the Public Service Commission, such as deputy ministers, some associate deputy ministers, heads and certain members of agencies, boards and commissions, ambassadors and ministerial exempt staff. The government has the authority to make these appointments on the appropriate basis as determined by law. Kernaghan observes that it is difficult to measure with precision the impact of these appointments on the status of political neutrality. "The appointment of such persons to public service posts without competitive examination and on grounds of partisanship violates the merit principle but not the merit system."⁵

4. Kenneth Kernaghan, "Politics, Policy and Public Servants; Political Neutrality Revisited," Canadian Public Administration, 19, No. 3 (1976), p. 433.

5. Ibid., p. 445.

There are certain arguments for and against restrictions. It can, on the one hand, be argued that there is a need to protect and maintain the political impartiality of the public service, since employees engaging in political activities would at least undermine public confidence in its impartiality by placing themselves in circumstances that would develop loyalties to a political party at the expense of their loyalty to their minister and the government. Also, the employee could face conflict of interest situations where the objectives of the government and those of his or her political party are in conflict. Strong party affiliations could also place employees in situations where they may feel a desire to influence decisions improperly on the basis of political patronage, such as in employment matters or the awarding of contracts. Finally, there is the view that, where restrictions on partisan activity by public servants do exist, they result in a climate which is more likely to engender an attitude of professional neutrality and impartiality.

On the other hand, one could observe that the political neutrality and impartiality of a public service has never prevented governments from using their administrative machinery for partisan purposes, nor has it prevented public office holders from aspiring to political office or holding private political views. Both of these factors could erode the political neutrality and impartiality of the public service. It certainly has been the case that a number of Canadian public servants have entered and become prominent in political life over the years, including one member of this Task Force.

There are several considerations, which in our view are persuasive, in favour of a politically neutral public service. Ministers and parliamentarians have a related concern that officials should not use their public positions to promote their personal political philosophies. Ministers have an additional interest in that they must be assured that the advice they receive is not motivated by partisan or other types of political considerations, and that, in the execution of decisions and administration of policies, their officials act in good faith. The public service itself, aspiring to serve governments of varying political complexions, has a complementary interest -- its own rationale depends upon being perceived as the impartial servant of whatever government is in office. Individual public servants, while having an obvious personal interest in these general concerns of the public service about maintaining its neutrality, are also affected by policies in this area if they wish to exercise the basic democratic rights of Canadian citizens as regards political activity. Finally, the interests of the public are diverse. Citizens must be assured that political allegiance is not a factor in the dealings they have with government departments and agencies. Citizens, along with public

servants, expect that advancement in the service will be on grounds of merit rather than partisan reward.

These considerations apply not only to public servants, but have an equal bearing on employees of Crown corporations and autonomous agencies, members of the Armed Forces and the Royal Canadian Mounted Police.

The traditional doctrine and practice of political neutrality has been modified by the broadening of the permissible limits of political activity, but the effect has not, to date, been rapid or revolutionary. However, the delineation of permissible rights and the full impact of the Canadian Charter of Rights and Freedoms are yet to be seen.

While the tradition of anonymity has remained strong among non-elected public office holders, their visibility has been heightened by changes in political institutions and practices, not to mention the results of the Access to Information legislation and the response of the media to demands for more public information. Indications are that this decline in official anonymity will continue.

In a democratic society it is desirable for all citizens to have a voice in the affairs of the State, and for as many as possible to play an active part in public life. Yet the public interest demands the maintenance of political impartiality in the public service and of confidence in that impartiality as an essential part of the structure of government in this country.

The principle of political neutrality can be expressed as follows:

Non-elected public office holders must not engage in partisan political activities which will jeopardize the political neutrality, both real and perceived, of the public service.

8. Criticism of Government Policy

Closely entwined with the question of partisan political activity is the "well-established tradition that Government employees do not express publicly their personal opinions on matters of political controversy or on existing or proposed Government policy or administration".⁶

6. Kenneth Kernaghan, Ethical Conduct: Guidelines for Government Employees, op. cit., p. 35.

We recognize that this tradition, like the tradition of political neutrality of the public service, is under attack from various quarters and for several reasons. Government employees are called upon increasingly to provide information about programs, and to operate in conciliation type roles. We often hear Canada described as an "information society" and this fact, combined with the frequently expressed ideal of a well-informed public, requires public office holders to be ready, willing and able to spread information about government policies and operations whenever possible. Moreover, as new functions are developed in government to take over tasks traditionally fulfilled by elected representatives -- such as meeting with interest groups and community representatives to hear their grievances and work out solutions to problems -- a number of senior public office holders have come to perform in a fashion which makes public comment almost inevitable. Greater interest on the part of the media to report the views of certain public office holders has become another factor in this equation.

What is certainly required is guidance for public office holders, as to the kinds of public comment in which they may engage, the procedure to be followed in contacts with the public and the press, and the means of resolving uncertainty regarding the types of public comment which constitute permissible conduct. For example, it is not intended to limit the rights of any employee in relation to any matters lawfully within the subject of collective bargaining under the Public Service Staff Relations Act. We believe that an effective means of achieving this objective is to include a rule on public comment in a code of ethics. This will be discussed in detail later in this report. For the time being, the following basic principle is expressed:

Public office holders shall not express publicly personal views on matters of political controversy or on government policy or administration, where this is likely to impair public confidence in the existing or subsequent performance of their duties or which is likely to impair relations with other governments.

The above rule does not prohibit employees from exercising their rights under the Public Service Staff Relations Act.

9. Conduct Unbecoming to One's Public Position

The way in which public office holders conduct themselves on a personal level can have significant impact on both their ability to discharge their duties adequately, and on the public perception of government.

Our terms of reference include reviewing the policies that should govern the conduct of public office holders. We do not wish to interpret this so broadly as to enter upon matters of personal behaviour of those in the public service. We have noted, nevertheless, in our review of existing guidelines, particularly the supplemental codes of conduct and various draft codes now being developed, that there is increasing discussion, in the context of dealing with conflict of interest questions as they have traditionally been interpreted, of topics such as harassment (sexual or otherwise) of personnel at the workplace.

One significant area of personal conduct that obviously would be improper for those in government service would be inappropriate discrimination in the performance of one's duties. The law already prohibits discrimination against any person by reason of race, national or ethnic origin, colour, religion, age, sex, marital and family status, disability, or conviction for which a pardon has been granted. This concerns, for instance, how government officials and employees deal with members of the public.

Beyond this, all employees and officials in the public service of Canada have the right to be treated fairly in the workplace, and to be able to operate in an environment free from discrimination, personal harassment and sexual harassment. Any behaviour which denies individuals their dignity and respect, or any use of authority or position to intimidate, coerce or harass, cannot be tolerated. This applies both to one's fellow members of the public service, and to the members of the public with whom one is dealing.

"Personal harassment" would include any behaviour by a person that is directed at and is offensive to an employee or endangers an employee's job, undermines the performance of that job or threatens the economic livelihood of the employee. "Sexual harassment" would be comprised of offensive sexual comments, gestures or physical contact that may be deemed objectionable or offensive, either on a one-time basis or in a continuous series of incidents, however minor. Generally, sexual harassment is behaviour of a sexual nature that is deliberate and unsolicited. Such harassment is coercive and one-sided, and both males and females can be victims of it.

It is an abuse of authority for an employee to use his or her authority or position with its implicit power to undermine, sabotage, interfere with or influence the career of another public servant, or interfere with the provision of goods and services to the public. This includes such blatant acts of misuse of power as intimidation, threat, blackmail and coercion. It applies to the distribution of work assignments, training or promotional opportunities, the evaluation of performance, or the provision of

references. It also includes favouritism of one employee to the disadvantage of another.

Employees in the public sector should of course be mindful of the public image of their department or agency. A sense of professionalism is required on the part of those in public service, in the way they deal with others, so as not to bring the government into discredit.

The principle here can be stated as follows:

Public office holders shall not engage in personal conduct which exploits for private reasons or personal gratification their position of authority, nor which would tend to discredit the professionalism of the public service.

CHAPTER 4

WHO IS RESPONSIBLE FOR ETHICAL CONDUCT IN THE PUBLIC SECTOR?

Maintaining standards of ethical conduct is everybody's business. Eight separate loci of responsibility have been identified and each is now considered in turn.

1. Responsibility of the Individual

Under the present guidelines governing conflict of interest, primary onus rests with the individual to ensure that he or she is not in an actual, apparent or potential conflict of interest situation, and that if such a problem arises, it is the individual's responsibility to see that the difficulty is resolved satisfactorily. We recommend that this concept of individual responsibility be retained. There are at least two basic reasons for stressing the importance of individual responsibility in dealing with conflict of interest issues.

First, it is in the mainstream of our Judeo-Christian philosophy to recognize that the individual is responsible for his or her own actions. This is such a basic concept in the fundamental philosophy of our society that it provides an important underpinning for any system of rules regarding ethical conduct in government. This approach rejects the excuse that "I was only following orders" or that "Everybody else was doing it", a theme reiterated with great poignancy at the Nuremberg war trials in Germany after 1945, when a number of officials from the Nazi Government were brought to trial and convicted of war crimes. The principle was upheld that one cannot transfer to the collectivity, or to some autonomous organization, responsibility for one's unethical or criminal acts. A system which fixes on the individual's personal responsibility for his or her actions keeps the sharp edge of reality where it is most effective.

A second reason for incorporating the concept of individual responsibility into any system of rules respecting ethical conduct in the public service pertains to management-labour relations. When it is clearly understood that an employee is responsible for conducting himself or herself in an ethical fashion, and within specific and stipulated rules, then any breach of these rules constitutes grounds for disciplinary action against

that individual. Without the link between individual responsibility and compliance with rules of conduct, there would not be an adequate legal basis for management to bring an errant employee to account.

2. Responsibility of Management

It is also essential to recognize a responsibility on the part of management in dealing with conflict of interest issues. The responsibility of public service management is to ensure that procedures are in place to handle conflict of interest questions and that the methods by which officials may seek advice and have decisions reached in resolving conflicts are well known and understood. This responsibility is twofold: to develop effective procedures, and to publicize them adequately so that individuals will know where to turn when they need advice or need to disclose a conflict to their superior.

3. Responsibility of the Prime Minister

A large measure of responsibility rests with the Prime Minister in relation to matters of ethical conduct in the public sector for several reasons.

First, the Prime Minister sets the tone for the entire government. By his or her conduct, and that which he or she requires from others, a clear signal is given to all those in the public service, and to the country at large, as to the standards which are being followed. This was understood, but we became all the more convinced of its importance in reviewing how the increase in the number of public servants, and the greater scope and range of government activity in the economy, have fundamentally altered the nature of government itself. The setting in which public servants operate has changed.

As we reviewed the situation elsewhere, in the United States at the federal level, for example, we came to appreciate the difficulties that arise when responsibility for matters of ethical conduct tends to be located at the mid-management level. More senior officials are seen to deal with policy and general administration, but questions of ethical conduct are treated, by inference at least, as having lesser importance. For this reason, the importance in the American system of having the President attach priority to questions of ethical conduct, and to say so publicly, has been stressed. With respect to the private sector situation in Canada, it was emphasized that the chief executive officer of a company must clearly demonstrate to all employees that adherence to a code of conduct is a significant matter. In short, a clear signal must come from the very top.

Secondly, the Prime Minister is responsible, directly and indirectly, for most senior government appointments, including all Cabinet ministers, parliamentary secretaries and deputy ministers, and many Governor-in-Council appointees. In the process of making these appointments, or seeking the resignation of those whom he or she feels should no longer continue in office, a Prime Minister is guided by a number of factors, one of which certainly is the question of the probity of the individuals in question. The Prime Minister has prerogative powers to make rules in this area, and indeed it is on this basis that the current guidelines, embodied in Orders-in-Council, originated.

4. Responsibility of Law Enforcement Agencies and the Courts

A number of the more serious conflict of interest problems are contemplated by provisions in the Criminal Code. In Canadian law enforcement, police officers and others affiliated with enforcement have a responsibility to investigate allegations of unlawful conduct, and to lay charges where warranted. Sometimes it may be difficult to draw the line between breach of conflict of interest rules, and violation of the Criminal Code. During the course of our review, a matter was under investigation by the RCMP and departmental officials involving allegedly unethical or illegal activities in the translation services of the federal government, in connection with which criminal charges had been laid by the police against certain individuals, and disciplinary proceedings initiated by management against certain other individuals.

The responsibility of the courts in cases involving issues of ethical conduct which come before it is, of course, to interpret the facts and apply the law in a just fashion. In the process, the role of court proceedings can be of importance in sending a general message to Canadian society about the way in which unethical and unlawful conduct is dealt with. It can be said that courts have a responsibility not only to deal with the specific case before them, but to address, in the process, the larger public audience.

5. Responsibility of Parliament

Not all current policies and procedures dealing with conflict of interest are contained in Orders-in-Council. A number of provisions are found in acts of Parliament. In this sense, Parliament has a responsibility as law-maker to ensure that those provisions which it enacts dealing with matters of ethical conduct and conflict of interest are intelligently framed and adequately stated. Several cases of admirable wording are noteworthy such as section 3.(5) of the National Energy Board Act which prohibits members of the board from owning any financial interest in energy-related corporations. The section, which consists of a

single sentence, is comprehensive but precise. Those who initiate further legislation in this area should be mindful of the desirability of simplicity, comprehensiveness and conciseness in the statement of ethical rules.

Parliament has other responsibilities in this area, besides enacting laws. A number of parliamentary committees have jurisdiction over areas or subjects where matters of ethical conduct can arise, and thus Parliament has a "watchdog" responsibility to ensure that these matters are aired responsibly whenever necessary.

Parliament is a forum for competing and conflicting interests, and a number of statutory and other provisions regulate the way in which parliamentarians can involve themselves, or make representations on behalf of certain groups, in the legislative process. A number of sections in the Senate and the House of Commons Act govern this area of activity, and these provisions are supplemented by several others, such as those of the Criminal Code, the Canada Elections Act, and the Standing Orders of the House.

Another way in which parliamentarians have a responsibility is by setting an example, since they are prominently in the public eye and their actions and ethical conduct send a signal to the public service and the country at large as to the norms of acceptable behaviour.

6. Responsibility of the Political Parties

Political parties do not welcome scandals involving their members, and for this reason have an interest in ensuring a proper degree of ethical conduct. This interest, in some respects, translates into a responsibility. Because the party apparatus is ongoing, and the name and reputation of a political party is a matter of goodwill and reputation over time, any dishonest or unethical activity by party members, whether elected or in certain cases appointed to public offices, constitutes sufficient reason for taking whatever disciplinary action or other sanction may be available. While an individual seldom is drummed out of a political party in Canada, party discipline can be brought to bear in various ways.

Furthermore, political parties have a responsibility to ensure that their policies or programs include measures designed to address, or respond to, the important issue of ethical conduct in the public sector. This is hardly an academic matter, since questions of this nature arise from time to time in Canadian public life, and political parties through their spokespersons have a responsibility to address the issues involved. We would

expect that political parties would consider this report and adopt policy in relation to its recommendations.

7. Responsibility of the Media

A significant measure of responsibility rests with the media, first, to bring conflict of interest problems to public attention when they are uncovered, and secondly, to do so in a responsible fashion. With respect to this first responsibility, namely, publicizing cases of unethical conduct, it is hard to overstate the important role which the media play in drawing problems to public attention. In practical and political terms, without the media bringing such matters before the court of public opinion, transgressions might not receive the condemnation they warrant.

Earlier we mentioned "Don't do anything you'd be embarrassed to read about in tomorrow's newspaper" as an easy rule of thumb to use in deciding whether a particular action would constitute unethical conduct. From another perspective, without the media, the essential link between the individual and public opinion in relation to which he or she determines an appropriate course of action may be missing.

As Michael J. Smither has observed, the role of public watchdog overseeing the political process has traditionally been assumed by the media.¹ If correctly discharged, the media's responsibility proves helpful in ensuring that public policy objectives are met. He states that, however,

the need for veracity when reporting on the subject of conflict of interest and also for a clear understanding of the legislation cannot be over-emphasized. These requirements are an imperative. The consequences of failure to accurately report on such matters can have wide implications for the journalist, the members affected and, ultimately, for the public whom both seek to serve.

He suggests that when a journalist fails to discharge this responsibility, the public may be misinformed; the intent of the legislation or rules governing ethical conduct may be negated;

1. Michael J. Smither, Municipal Conflict of Interest (St. Thomas, Ontario: Municipal World Inc., 1983), p. 123.

the member, or potential member, of the legislature may be discouraged and may suffer financial or other damage in his or her political, business and social life; or the journalist and his or her publication may face an action for libel. Alternatively, a contravener of the rules may escape detection or be otherwise encouraged.

Apart from these consequences, a competent journalist understands that a quest for truth in the realm of ethical conduct must begin with knowledge of the objectives of the applicable laws and rules, and of the duties which they impose upon the public officials subject to them.

8. Responsibility of Educators

Those who educate and instruct us -- parents and other family members, teachers, the clergy, professors, judges, or superiors for whom we work -- have a clear responsibility to transmit from generation to generation a sound understanding of ethical values.

The code of ethical conduct which we propose would be meaningless without the pre-existence of a public consciousness and awareness of the importance of honesty and ethical behaviour. In this context, we recommend that the Ethics Counsellor be given the mandate to educate, inform and instruct persons to whom guidelines apply, the authorities responsible for their administration, management within government and all those concerned with this domain.

CHAPTER 5

ALTERNATIVE APPROACHES:

UNWRITTEN RULES, CODES OF CONDUCT, GUIDELINES, STATUTORY REGIMES, ETHICS COMMISSIONS

Various methods exist for dealing with conflict of interest situations, and this chapter contains general observations about these alternative approaches.

(a) Unwritten Rules

The approach which has been the most wide-spread in Canada and still applies in a number of provinces is the traditional one of having no written rules and of relying on people's sense of what's right rather than on words on paper as a guide to what can and cannot be done when private and public interests conflict.

When the two of us entered Cabinet, as noted earlier, there were only unwritten rules governing ministerial conduct and conflict of interest. The same was true generally in the public service.

In the course of our review, we spoke with a number of senior public servants and former public servants, many of whom recalled the days of unwritten rules. "We all knew what you could and could not do, and besides, there were so few of us that we all could keep an eye on one another," observed one former deputy minister. This official and several others expressed a certain nostalgia for those days of a simpler approach to questions of ethical conduct. There was a yearning for the ethos of government in which ethical conduct was assumed to be the norm, and one's integrity and reputation, perhaps fortified by the watchful eye of close colleagues, would have made writing down rules to stipulate the bounds of ethical conduct seem unnecessary.

Yet everyone was unanimous in acknowledging that it is impossible to go back to the era of unwritten rules. The increase in the number of public servants, and the greater scope and range of government activity in the economy, have altered the nature of government fundamentally. The setting in which public servants operate has changed. Precise written codes of conduct could be as

helpful a guide today as the unwritten code was yesterday. As a committee of senior civil servants in Britain, reporting in 1972 on professional standards in the public service, concluded: "The existence of a comprehensive but intangible and unwritten code would be hard to verify and runs counter to many people's experience. We believe reliance on it leads to dangerous complacency."¹

(b) Codes of Ethics

No one suggests that the mere existence of a code of ethics is a simple and complete cure for problems of ethical conduct in the public sector. "The extent to which a code of ethics has value," suggests Professor Kernaghan, "depends on whether the code is written or unwritten, on its acceptance by the public and by government employees, and on its form, content and administration."² In dealing with the merits of a written code, he says that government employees, as citizens, naturally adopt the ethical practices and standards that are accepted by society and tend to reflect them in their actions at work and away from work. A formally written code of ethics provides employees with a reference point from which they may assess their own conduct as well as the conduct of those around them. It stipulates what kinds of behaviour are prohibited and can indicate the penalties associated with any violation of the principles.

Once a code is in place, employees will tend to use it as a form of self-discipline; they will come to know inherently how they should conduct themselves. The role of senior employees is important in keeping employees informed regarding what is expected and they must also demonstrate exemplary behaviour. The expectations of peers in terms of ethical standards can also be a positive influence on employees. The raising and maintenance of ethical standards among groups of employees will be higher with the existence of a written code.

Of course, there will always be employees whose behaviour remains unaffected by the establishment of a code of ethics. It is for this group that a written code can be used as an administrative control - particularly if it includes specific sanctions. In such cases, management can use the code as a yardstick to measure the degree of non-acceptability of certain behaviour and the seriousness of specific breaches of conduct.

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1. Professional Standards in the Public Service, a Report by a Sub-Committee of the First Division Association, Public Administration (U.K.), 50 (Summer, 1972), p. 169.
 2. Kernaghan, Ethical Conduct, op. cit., p. 5.

Despite this, there are some strong arguments for an unwritten code. It is reasoned, first, that employees can best conduct themselves based on customary practices and informal understandings. Second, there is evidence that many cases of unethical behaviour cannot be covered by a written code. Third, it may be difficult to obtain agreement on what conduct should be considered acceptable or unacceptable.

(c) Guidelines

The present conflict of interest rules at the federal level are, for the most part, contained in "guidelines" that are largely hortatory in nature. The wide-ranging interpretation that different individuals place on the meaning and legal significance of guidelines is a source of concern. To some, guidelines are law, to others merely helpful advice and suggestions as to the direction one ought to follow. For those of the latter school of thought, it is certainly not the end of the world if one's actions are outside the guidelines; to the former, violation of the guidelines would be like breaking any other law.

The looser interpretation of the concept of "guidelines" is perhaps easier for those thinking in the English language than in French, since the French expression "lignes directrices", which is the equivalent of "guidelines" in English, contains a clearer notion that these lines or rules are directory.

Administrative law recognizes a clear distinction between directory and mandatory statutory procedural requirements: the latter must be followed to the letter whereas the former need only be substantially complied with. Moreover, administrative law also recognizes a distinct legal significance to guidelines, policies, manuals and the like that have no force in law. They may be followed, but need not be. Equally important, they must not be applied as if they were law.

A specific problem of the present guidelines is that they combine both general principles and procedural matters, whereas in our view these should be dealt with separately. There has been an effort to separate basic principles from matters of procedure, and the guidelines have been divided into parts with some provisions annexed as schedules. Yet, in our view, the separation has not been adequate, with the result that principles and procedures are often intertwined.

Because of the varying of interpretations of the meaning of guidelines, and because this term has been used long enough now in connection with the rules applicable to the federal public sector, so that this ambiguity or uncertainty of meaning has become both widespread and entrenched, it is recommended that use of the term "guidelines" be abandoned.

(d) Statutory Régimes

It has been a particular hallmark of the approach to ethical conduct in the United States to enact a statute, and typically to establish an independent "Ethics Commission" or similar body to ensure compliance with the rules stipulated in the Act.

The advantage of a statutory régime is similar to the advantage already noted with respect to written codes of ethics; those concerned are certain of the rules since they have been confined to writing, and the existence of such provisions is also useful as an instrument of public administration. In the case of such codes being embodied in statutory form in the United States, the further advantage is that these rules have the force of law, and are attended by normal procedures of "due process", the clarity of sanctions, and an easily established reference point for those seeking legal interpretation of their rights and obligations.

A disadvantage, in the eyes of some, is that this approach tends to make procedures relating to ethical conduct overly legalistic. This school of thought would favour a purely administrative approach, assisted by some discretionary powers and greater latitude for interpretation.

In most cases enactment of a statute to deal with ethical conduct represents an effort to deal generically with the problem, in a full and broad-based fashion. This American approach stands in contrast to what, more typically, has been the British-Canadian approach of an incrementalist response to particular problems as they have arisen by developing specific policies or rules, and even at that, by leaving those rules more in the realm of public administration than of law enforcement.

Several Canadian jurisdictions have taken the legislative route. In New Brunswick for example, conflict of interest provisions applicable to ministers, deputy ministers, judges, ministers' staff and members of the legislative assembly are contained in the Conflict of Interest Act 1978. Provisions pertaining to members of the legislatures at all levels in Canada (federally, provincially, and territorially) are expressed in statutory form, as in the Senate and House of Commons Act, and the various legislative assembly statutes and ordinances across the country. At the municipal level, the statutory approach has also been adopted in several cases, such as with the Municipal Conflict of Interest Act of Ontario which applies to all municipal councils throughout the province. Most of these enactments pertain to elected representatives.

As far as public office holders are concerned, the Canadian approach, generally speaking, has been to avoid the approach of enacting a single comprehensive statute to govern ethical conduct. It would be a mistake, however, to suggest that no legislation has been enacted in this area, since there are many individual provisions in a variety of statutes that deal with particular conflict of interest matters. These scattered provisions are, once again, typical of the incrementalist response to the problem.

In jurisdictions which have adopted a statutory régime to govern ethical conduct, such as at the federal level in the United States, with its Ethics in Government Act, a fairly large body of jurisprudence, legal opinion and interpretative bulletins has subsequently developed to assist in applying the law to specific situations. Two American publications now exist to deal with this plethora of rules: the Federal Ethics Handbook, which is an annotated legal guide, and the Ethics in Government Reporter, which is a digest of statutes and executive orders, federal regulations, case rulings, Office of Government Ethics advisory opinions, agency regulations, notes on legal professional responsibility, and forms.

We do not believe it is necessary to use so many words to delineate and interpret the acceptable balance of ethical conduct in the public sector. We doubt the Canadian experience would parallel that of the United States, a country with two-thirds of all the lawyers in the world, which has followed a more litigious approach and a more entrenched concern for "due process" at all stages, resulting in a scale of operations, which, if translated into the Canadian context, would be unnecessarily large. The rigour and effectiveness of rules for ethical conduct do not in our view depend on the size of the operation established to administer them, as much as on other key factors.

(e) Ethics Commissions

Under a number of the United States statutes referred to in the preceding section, an Ethics Commission is constituted, given a mandate to enforce and interpret the rules of ethical conduct, asked to perform an educational role with respect to the rules, and required to be available for consultation and advice to government administrators who deal with conflict of interest problems. The existence of such a commission is the necessary concomitant of a regulatory approach to this subject. It is, in a way, similar to passing a securities act, which among other things establishes a securities commission to ensure compliance with the newly enacted securities law.

Such commissions operate under various names. For example, at the federal level in the United States, there is the Office of Government Ethics, while at the state level one finds the "States Ethics Commission" (for example in Hawaii, South Carolina, and Massachusetts), and variations on that theme, as in "State of Florida Commission on Ethics", "State of Wisconsin Ethics Board" and "Illinois Board of Ethics". Some commissions have broader mandates as reflected in their names as for instance, the "State of California Fair Political Practices Commission".

The mandate of a number of these American state commissions is broader than the concept of ethical conduct in the public sector on which we are focusing in this report. For example, the rules governing election finances, campaign contributions and disclosure are administered by some of these commissions. In Canada, financial assistance in the form of campaign contributions has traditionally been kept distinct from prohibited fees (something which, with Criminal Code provisions, is very much a conflict of interest matter), provided such contributions are not intended as another form of prohibited fees. As noted on page 17 of the 1973 Green Paper on Members of Parliament and Conflict of Interest, election expenses are a subject area closely related to conflict of interest but, because of growing complexity in both fields, are best treated separately. It must be acknowledged that conflict of interest provisions will remain incomplete unless there are also provisions in the area of campaign contributions.

In 1974, the year following the tabling of the Green Paper, the Election Expenses Act (S.C. 1973-1974, chapter 51) was enacted by Parliament to meet precisely this point, with the result that we now have operating in Canada at the federal level a separate legal régime, administered by the Commissioner of Canada Elections, to deal with election contributions and campaign expenses. In several of the American states, separate commissions have likewise been created for this purpose, and they function independently of state ethics commissions, although we have been advised by the executive directors of a number of these bodies that there is frequent communication between them to ensure compliance with their respective statutory régimes, which can be verified by cross-checking certain disclosure reports.

What is striking about the role of ethics commissions or similar bodies is their ability to play a continuing and dynamic role in educating public servants, and indeed the general public, as to the nature of the rules governing ethical conduct. We reviewed a number of their publications and video programs, and sat in on several "ethics seminars" and we were impressed by the positive role that can be played in raising people's consciousness for recognizing conflict problems when they arise, and for knowing how to resolve them. Indeed, our impression is that many such

commissions play a more important role as educator than as enforcer.

After reviewing these general approaches, it is concluded that dependence on unwritten rules is no longer feasible or desirable, that there is merit in the formulation of a code of ethical conduct for the public sector, that the term "guidelines" should be abandoned, that any statutory régime should avoid the legalistic United States pattern and that the proposal for an Ethics Counsellor has merit. In the next chapter, the techniques for dealing with conflicts of interest are described including divestment, disclosure and the establishment of trusts.

CHAPTER 6

TECHNIQUES TO MINIMIZE CONFLICTS OF INTEREST:

DIVESTMENT, THE ESTABLISHMENT OF TRUSTS, DISCLOSURE

The first principle of ethical conduct which we set down in chapter 3 states that public office holders must not have personal interests which would be affected particularly or significantly by government actions in which they participate. The subject discussed in this chapter is the variety of techniques that can be used to get rid of the property interest that creates the conflict.

(a) Divestment

In theory, divesting oneself of assets and business connections frees one for execution of one's official responsibilities without any risk of a conflict of one's governmental responsibilities with one's personal economic interests. One cannot deny the purity of purpose that an individual, having no vested interests, would have in decision making and policy implementation. Yet, there are no certainties in this area of human motivation and ethical conduct, and one might even suppose that a public office holder who had divested himself or herself of every single asset and business affiliation could thereafter come to feel a sense of envy, or jealousy or insecurity in relation to others around him or her. Were this the case, could one still ascribe to him or her such purity of purpose in his or her official actions?

The policy which holds that a public office holder should divest himself or herself of certain financial interests and obligations, as part of qualifying to hold a position of public trust, is a form of preventive medicine. This approach recognizes that public office holders, including ministers, must make major decisions which will have wide impact, an impact that could, sooner or later, reach to assets or interests with which the person is personally connected. Therefore, rather than an individual continually worrying about whether a particular decision will affect one of his or her specific vested interests, and rather than having the public perceive that a public office holder could be ensconced in a position to confer benefits upon himself or herself, it has been decided that the problem should be removed in advance by requiring divestment of certain types of assets and relinquishing of certain types of interests by those in authority.

Divestment can take a number of forms under the guidelines currently in force for public office holders where it is required. There is, to begin, a concept of exempt property which does not come under the severing axe. Beyond this, there are alternative means of divesting one's interests in non-exempt assets: either through outright sale at arm's length or through placing those assets in a trust. The system of disclosure is also relevant.

(b) Trusts

One of the ways by which an individual can divest himself or herself of non-exempt assets, as an alternative to outright sale, is to place them in trust.

There are several varieties of trust arrangements in use under federal guidelines, such as frozen trusts, blind trusts and retention trusts. With time, it may be that additional types of trusts will be devised to satisfy completely the myriad requirements in this complicated and refined area of holding and managing one's financial assets. For the present, we confine ourselves to descriptions of current arrangements i.e. frozen trusts, blind trusts, collateral arrangements with impact on trusts, and retention trusts.

1. Frozen Trusts

A frozen trust is one in which the trustee is instructed to maintain the holdings placed in trust exactly as they were when the trust was established. A person who establishes a frozen trust is entitled to receive from the trustee any income earned by the trust, and any information which is required by law to be filed.

The frozen trust option is currently made available to all public servants through a Treasury Board decision of 1982 with certain specific exceptions which are outlined in some of the supplemental guidelines of individual departments or agencies.

Until recently, the Assistant Deputy Registrar General (ADRG) was not authorized to act as trustee for frozen trusts required by public servants. The ADRG, of course, has general responsibility for administration of trusts for public servants. However, at the end of September 1983, it was accepted that nothing prevented the ADRG from acting in that capacity, in the same way he had been doing in the case of Governor-in-Council appointees. Since equity dictates that the services of the ADRG as trustee be available to all who are permitted to have a frozen trust, the concept was accepted by officials of the Treasury Board, the Privy Council Office and the Office of the ADRG.

As far as Governor-in-Council appointees are concerned, the frozen trust concept with the ADRG serving as trustee existed as a result of the Guidelines for Ministers of the Crown announced by the Prime Minister in 1973, and was included in the written Guidelines for Governor-in-Council Appointees in November 1974 as a matter of course. The Guidelines for Ministers' Exempt Staff as they were written in 1975 also provided for frozen trusts, including the facilities of the ADRG.

With a few exceptions, frozen trusts have tended to be established with the ADRG acting as trustee, rather than with other eligible trustees. These few exceptions have generally been where some form of retirement fund had already been contemplated or undertaken by the individual and the frozen trust established was merely a continuation of arrangements previously made to hold on to specific shares within the options available in the guidelines.

The main advantage of having a frozen trust is that the individual concerned knows that the assets placed in it will be returned unaltered except for share splits or redemptions as soon as he or she is no longer subject to the guidelines. There has been a significant saving for individuals having frozen trusts with the ADRG because, apart from a few out-of-pocket expenses to set up the trust, no other charges apply since the administrative cost is part of the ADRG's regular budget.

During the period when ministers' exempt staff and Governor-in-Council appointees could have their assets in frozen trusts, they only took advantage of the option to a limited extent. In some cases, reasons for establishing the trust rather than selling the assets were that the shares had sentimental value but very little intrinsic value, the individual had been left the shares by a close relative and did not wish to make any changes, or the individual was not expecting to remain in government service for very long before retirement.

Some frozen trusts contained worthless shares. In several cases, these valueless shares became actively traded and it was then considered appropriate by the ADRG to allow the individuals concerned to switch their holdings to a blind trust.

Most frozen trusts have consisted of a small number of securities, and the understanding has been that such securities were not to include any items which the ADRG would have to "manage" other than to collect dividends, receive share splits, or to realize upon the proceeds of rights which could be sold automatically. Frozen trusts were not and are not considered suitable for convertible securities, real estate, or other investments which require active participation by the owner of the securities or the persons acting as inter vivos trustees.

There are certain disadvantages to frozen trusts. For example, offers to purchase shares have occasionally been forthcoming, but have had to be ignored by the ADRG under the terms of the trust deed. These offers remain open until such time as 90% of the shares have been taken up by the purchaser. By that time, however, the trustee has been able to respond to the obligatory redemption or exchange. These problems arose, for example, with the Canada Permanent takeover by Genstar and the amalgamation of the Unity Bank with the Provincial Bank, followed by the fusion of the Provincial Bank with the Canadian National Bank. On a couple of occasions in the early days of operation of the Office of the ADRG, a share that was convertible was accepted in a frozen trust. In one case, convertibility was prevented and the individual beneficial owner had to treat this as a "cost" of being subject to the guidelines. On another occasion, an individual had a very small holding of a convertible stock which was subject to a redemption or conversion call by the company. Since more than 90% of the shares had been converted, the view of the Office of the ADRG was that conversion did not imply management of the assets. Today, it is not likely that a convertible security would be accepted into a frozen trust except under specific conditions which were known to the settlor and the trustee and agreed upon prior to execution of the trust agreement.

Since the option of using the ADRG for frozen trusts by public servants has not been publicized, few have taken advantage of it. The number of frozen trusts is small, but it should be noted in this context that the guidelines applying to ministers and to designated exempt staff since 1979 no longer permit frozen trusts as one of the methods for divestment.

2. Blind Trusts

A blind trust is one in which the trustee is empowered to make all investment decisions concerning the management of the trust assets, with the person who has placed the assets in trust having no direction or control. No information is given to the settlor about the status of the assets, except information required to permit an annual evaluation of the trust and any information which is required by law to be filed. The settlor can receive income earned by the blind trust, and add or withdraw capital funds as he or she sees fit.

Blind trusts have existed from the inception of the guidelines in 1973, and are available as a means of divestment for all groups. Indeed, blind trusts were established in several cases long before the advent of the guidelines, and it was necessary to rewrite certain parts of such existing trust provisions to ensure they conformed to the new requirements established in the guidelines.

Several points to observe about the present arrangements and operation of blind trusts are that the ADRG may not act as a trustee of a blind trust, and that the eligible trustees for Governor-in-Council appointees are a wider group than those in the current Guidelines for Ministers and their designated exempt staff. The Governor-in-Council appointees may have a trust with anyone at arm's length who is accustomed to acting as a trustee, while the current Ministers' Guidelines provide that the trustees must include either a trust company or a member of the Investment Dealers Association of Canada. These can be either sole trustees or trustees in addition to others, but in any event they have a casting vote.

In many cases the ADRG acts as a go-between in establishing blind trusts, and is obliged to rule on whether the trust arrangements as adopted by the settlor with his or her trustee meet the requirements of the applicable guidelines. The ADRG has streamlined this process by offering sample blind trust documents to those seeking to establish such a trust. These samples or precedents include trust documents suitable for use in any province in Canada (including Quebec, where the terminology and legal concepts in the trust area are somewhat different). Adaptations of several discretionary account agreements for stock brokers and their clients also are made available. In short, the ADRG has tried to ensure that the simplest means of setting up a blind trust can be followed, having regard for the essential conditions which are spelled out in the guidelines.

The blind trust must be irrevocable and its term must be for as long as the settlor continues to hold any office to which conflict of interest guidelines apply or until his or her death, whichever first occurs. Should the assets of the trust be exhausted, due to demands by the settlor for capital funds or due to bequests made to beneficiaries, the trust, for all practical purposes, terminates and can be revoked. As a practical matter, however, it can be in the interests of the settlor to maintain the trust in existence in case he or she wishes to have funds invested in the future or inherits non-exempt property which cannot be held personally. The trust must be declared to be domiciled within a particular jurisdiction. The jurisdiction is usually the province in which the assets are located or in which the settlor resides. By so domiciling the trust it becomes subject to the trust laws of that jurisdiction, and the terms and conditions of the agreement are interpreted in accordance with those trust laws.

The disadvantage of a blind trust is often that the cost is high in relation to the value of the assets being placed in trust. The more substantial trusts have their costs offset by the income, but those who felt themselves obliged to establish a small blind trust have had to pay considerably more than the income generated for the privilege of maintaining such a vehicle for their investments.

3. Retention Trusts

In cases where holding companies have been established for estate planning purposes, rights in such companies may be put into a trust for retention. In such circumstances, the trustee may not dispose of or otherwise affect the rights placed in trust. The Assistant Deputy Registrar General may serve as trustee of such trusts.

In establishing such trusts, ministers may make arrangements to have third parties exercise their voting rights in relation to the shares in the holding company as long as such arrangements will not result in a conflict of interest. Ministers who have established such trusts cannot be consulted or informed of the disposition of any assets owned by the holding company that would be considered to be "controlled assets" under the terms of the guidelines applicable to ministers of the Crown.

Retention trusts are a recent innovation, first permitted under the guidelines of April 1980 for ministers of the Crown. Because the retention trust requires the formation of a family holding company for estate planning purposes, it is not a vehicle which is suitable for many people.

In practice, a blind trust can be a retention trust, particularly in respect of Governor-in-Council appointees who do not have the option of a retention trust. The frozen trust option available to Governor-in-Council appointees is not, however, the equivalent of a retention trust since the formation of a holding company is not necessary in the case of a simple frozen trust.

The main advantage of the retention trust is that it is a useful divestment vehicle for ministers who have substantial assets and who have arrangements in place which require that the assets be held under proper management through a holding company. The disadvantage of such a trust is that it is a prohibitively expensive route to be followed by someone of modest means who would rather have had a frozen trust.

4. Collateral Arrangements Regarding Trusts

In a number of situations, individuals have been in a position where their security has already been hypothecated to a financial institution in support of a loan. The typical example would be where a Governor-in-Council appointee has a bank loan secured by publicly traded shares. This situation of course raises the question of how such shares are to be dealt with in terms of divestment.

There are two ways of dealing with this situation. One is to transfer the security to a trustee and have the trustee make some form of undertaking to the lender with regard to the

collateral for the loan. The second method, often involving a temporary situation, is to agree that the collateral arrangement with the lender is tantamount to a blind trust. For example, a senior public official transferred to Ottawa from another location, unable to sell his house, pledged his securities to a bank in order to borrow sufficient funds to relocate in Ottawa. This collateral was held by the bank, and an agreement was made whereby the securities would be placed in some form of trust if and when the need for the collateral ceased. This arrangement at its inception was considered to be tantamount to a blind trust; to be strictly accurate, it could be argued that it was as much in the nature of a frozen trust. It would depend on the circumstances at the termination of the loan as to whether the term "frozen" or "blind" should be used to typify this kind of trust. In either case, it was always possible that the security would be sold in order to repay the loan and there would thus be no assets to be placed in the trust.

5. Income Tax Considerations of Trust Arrangements

Advice on income tax is not something which is offered by the Office of the ADRG. It is understood that individuals who are subject to the guidelines are told that any special arrangements which they make for their assets may have income tax consequences, and are advised to seek proper legal and accounting counsel accordingly.

6. Audits of Trust Arrangements

Audits are required for blind, retention and frozen trusts. For both blind trusts and retention trusts, provision for an audit is usually included as a clause in the agreement. For frozen trusts, audit is considered a matter where the privacy of the individual requires that the audit be conducted by an outside auditor rather than by anyone from within the government. Currently, a chartered accountant audits the frozen trusts on an annual basis where the ADRG is the trustee and the audit report is reviewed by the Comptroller General of Canada before a final report is sent to the Prime Minister informing him that the administration of the frozen trusts in the ADRG's Office has been properly carried out.

7. Costs of Trust Arrangements

Payment of the costs of trusts is the subject of a new policy introduced in February 1982, applicable back to the date of issue of the latest set of guidelines -- the Guidelines for Ministers of the Crown of April 1980. This costs of trusts policy covers all types of trusts established to comply with conflict of interest guidelines under all sets of guidelines issued by the government.

Where a frozen trust is established with the ADRG, as mentioned earlier, there are no costs to be recovered, but when any form of trust is established with the assistance of lawyers, chartered accountants or other qualified advisors, establishment fees may be levied and the new policy provides that they will be reimbursed if the fees are reasonable. On occasion, the ADRG has disallowed some parts of claims as being unreasonable.

Costs for dismantling a trust are also payable. Experience with these has been very limited to date, but apparently no problems have been encountered.

The amount of administration and maintenance costs of trusts reimbursable is based on a formula whereby an annual amount of up to one-half of one per cent of the market value of the assets is eligible for payment. This means, since there is no minimum amount fixed for trust assets, that small trusts cost the settlor a good deal more than they can recover under the policy, whereas large trusts generate sufficient revenue to more than cover all such costs.

Treasury Board is currently examining the possibility of introducing a minimum fee so that there will be greater equity toward those who establish blind trusts with very small amounts. Should the frozen trust option be extended to exempt staff, for example, a number of the people who would otherwise have been poorly served by the policy for repayment of costs would probably opt for a frozen trust.

(c) Disclosure

As an alternative to divestment either through sale or use of a trust, the avenue of disclosure is available, with respect to certain types of property and interests for several categories of officials under the present guidelines.

As this relates to conflict of interest, the idea of disclosure is that making known to the public the nature and extent of one's assets and other interests is a sufficient safeguard to ensure that the official in question will act, and be constrained to act, in the public interest. Everyone will then know what the official's vested interests are, and can watch to ensure that he or she acts without acceding to any of these interests when making a decision. By the same token, those receiving advice from the official or hearing his or her comments will be able to appreciate his or her particular interest in the subject, since it will have been made known. Where necessary, these people would be prepared to discount the official's advice to some extent if they knew it pertained to a matter in which he or she had a private as well as public interest.

This general approach is followed in some ways in Canada, for instance in the legal requirement that members of municipal councils declare their interest in a matter on the council agenda, withdraw from the council table when the matter is under discussion, and refrain from voting on it. There are other examples. However, since discussions within Cabinet and among officials are secret, public disclosure of individual holdings of ministers and senior officials would not serve this same purpose.

Greater reliance on the disclosure method was adopted when, in December 1973, you announced, Prime Minister, that Cabinet ministers from that date forward would have available to them, as one of the several means for complying with the guidelines, the option of making a public declaration rather than divestment of certain assets that would not likely be a source of conflict.

There are two types of disclosure: confidential disclosure and public disclosure. The former occurs when a declaration is made to a designated official, revealing one's assets and interests, to enable that official to satisfy himself or herself that no conflict of interest occurs. That official in turn may then certify to others that the particular office holder, in respect of whom disclosure has been made on a confidential basis, is in compliance with the conflict of interest guidelines.

Public disclosure, as its name suggests, involves filing of declarations or reports in which assets and other interests are shown, but in this case the information is open for public inspection. Public declaration of holdings made in municipalities and in the House of Commons can reveal a conflict of interest or bias on the part of the municipal councillor or member of Parliament which can be taken into account during debate or voting on relevant issues. A second purpose of public disclosure is to reveal holdings of such a nature that they are unlikely to give rise to a conflict of interest but do not qualify as exempt assets. This is the purpose of the disclosure provision in the Guidelines for Ministers and Governor-in-Council Appointees. This option, in our view, might be enlarged without adding significantly to concerns about conflict of interest.

Internal confidential disclosure is inherent in supplemental departmental guidelines which require officials to reveal to their deputy ministers any personal interests that might involve a conflict of interest with their public duties, as a preliminary to action to minimize or remove the conflict. Internal disclosure is also inherent in the administration of frozen trusts and in certain aspects of the other responsibilities of the Assistant Deputy Registrar General.

The Ministers' and Governor-in-Council Appointees' Guidelines cover the topic of property which is subject to declaration or public disclosure fairly thoroughly. Both methods of confidential disclosure (as a means of ensuring compliance) and public disclosure (as a means of satisfying certain compliance requirements) are in use under the present régime.

(d) Disclosure Through "Government in the Sunshine" Laws

Disclosure is most routinely applied through procedures requiring public office holders to file statements or make declarations which reveal the nature and extent of financial and other private interests that could generate conflicting interests.

Another way the disclosure concept can be implemented, however, is through legal requirements for public business to be conducted in public -- especially where agencies of government are involved in deliberative procedures that lead to decisions such as granting or revoking licences, issuing permits of a special nature, and the like. This approach is popularly termed "government in the sunshine" in the United States which enacted the Government in the Sunshine Act in 1976. This means that procedures for decision-making which are open to public scrutiny can help ensure that decisions are made based on considerations of the public interest, rather than private interests or personal considerations. The purpose is to provide the public with information, while protecting the rights of individuals and the ability of the government to carry out its responsibilities. It is a law well within the tradition of disclosure which is a part of the American democratic instinct. The statutory intent is achieved through provisions for "open meetings" and rules governing "ex parte communications".

Government in the sunshine provisions are considered in the context of our review of conflict of interest policy, because such broad disclosure provisions can be an alternative or additional method for alleviating concerns people may have about vested interests that might be operating "behind the scene" when a tribunal decides to grant a licence, or a marketing board decides to alter quotas, or some similar decision-making procedure is followed. Development of appropriate sunshine laws for the Government of Canada might become an appropriate step following implementation of the Access to Information Act. Further measures to ensure that public business is conducted in public would perhaps increase public confidence in decision-making processes being conducted in the public interest. We would not envisage the application of sunshine legal procedures to most activities of government departments, but perhaps, to the operation of certain tribunals and agencies of the federal government. It is an idea that merits careful study which we recommend. At present, none of the provinces has enacted such legislation although we have been

told that a committee in Ontario may be considering the idea. However, we understand the federal Department of Justice is at the moment in the midst of an administrative law reform project, one of the aspects of which deals with procedures of tribunals and agencies, which will address ex parte communications and openness. The study we recommend could, therefore, most conveniently be carried out as part of this project by the Department of Justice.

If the Government should decide to consider more thoroughly whether to proceed with such provisions and then chose to implement them, they could be incorporated as part of the general program we are proposing in this report. There would be a need to add provisions regarding open meetings and ex parte communications for certain agencies and quasi-judicial tribunals. This could be done legally either by a single act (as at the federal level in the United States), or by specific amendments to the governing acts of those bodies to which the new rules for open decision-making are to apply. Depending on the timing of implementation, those amendments could be included in the Ethics in Government Act.

(e) Conclusion

The views of those who have been subject to various administrative arrangements for minimizing conflicts of interest are reported later in this report. At this stage, it is sufficient to observe that these techniques, however necessary they may be, are complex, involve serious financial and career problems for those who are required to follow them, ought to be administered with the utmost care and applied only where strictly necessary.

CHAPTER 7

HISTORY AND DEVELOPMENT OF THE FEDERAL CONFLICT OF INTEREST LAWS AND GUIDELINES

(a) Introduction: A Continuum of Rules Governing Ethical Conduct

The question of ethical conduct in the handling of matters of government has a long history. The dangers of being placed in an equivocal position in discharging one's official duties have long been recognized. Apart from religious and philosophical teachings about ethical conduct, the first efforts to address this subject in any formal manner in Canada found expression through provisions in the criminal law. This generally was the pattern in the English-speaking democracies through the eighteenth and nineteenth centuries, as provisions were added to statutes dealing with offences such as bribery, corruption, and fraud. A number of these provisions had earlier antecedents in parliamentary enactments in England which date back centuries. The criminal law provisions addressing flagrant abuses arising from conflicts of interest and improper conduct in public offices provide a backdrop to the conflict of interest rules.

The continuum of provisions is seen as starting with the extreme and severe sanctions found in the Criminal Code dealing with serious offences such as fraud, bribery and corrupt inducement of office holders; ranging through statutory provisions governing the conduct of those in public office and therefore still part of the law dealing with conflict problems but largely non-criminal in nature; and moving at the other end of the spectrum, to general statements or "codes" as to what is considered appropriate conduct.

(b) Expansion of Body of Laws and Rules Dealing with Conflict of Interest

For years, conflict of interest problems were addressed only by the criminal law, and by some procedural requirements about conduct of government employees in the acts which created their functions. Recently, as the nature and functions of government and office holders have changed, these rudimentary

provisions have been supplemented by the non-criminal laws referred to above. There are many examples (which are discussed fully in the next Chapter), such as section 32 of the Public Service Employment Act restricting partisan political activity by public servants and section 3(5) of the National Energy Board Act which prohibits members of the National Energy Board from owning shares or having interests in companies in the energy sector.

The most recent addition to this body of rules of conduct has been the practice of developing written "codes" designed to set the tone for one's conduct in public office and to establish procedures for preventing and resolving conflicts of interest.

It is this last development which has given rise to "guidelines". Some would see this process as little more than an effort to express in writing the "unwritten code of conduct" that directed men and women in earlier and simpler times. Although conflict of interest guidelines were not addressed in depth at the federal level in Canada until the late 1960s and were only reflected in actual Orders-in-Council in the early and mid-1970s, initiatives in this area date back to the 1920s, when the first Order-in-Council on this subject was passed to prevent civil servants from "moon-lighting" - the age old problem of serving two masters - which today is termed "outside employment".

Our terms of reference do not include examination of the conflict of interest rules which govern members of the House of Commons and members of the Senate. There are a number of statutory provisions in this realm, such as those found in the Criminal Code and the Senate and the House of Commons Act, as supplemented by some conflict of interest strictures in the Standing Orders of the House. Together they establish a legal framework for matters of ethical conduct within which the broad range of permitted activities by parliamentarians can take place.

Nevertheless, we do take note of several provisions of general application to members of Parliament and senators, because we are required under our terms of reference to consider the position of cabinet ministers and parliamentary secretaries. Since they are appointed from the membership of the House of Commons or the Senate, the rules of ethical conduct for members of Parliament can be seen as establishing a basic minimum of rules, upon which the further guidelines established for cabinet ministers and parliamentary secretaries have been built.

(c) Early Statutory Provisions Affecting the Public Service

The Civil Service Amendment Act of 1908 was a first step in eliminating the evils of patronage, through application of the merit principle to the "inside service" (civil servants in Ottawa)

and imposition of the penalty of dismissal for political activity. Professor Kenneth Kernaghan notes that patronage in the "outside service" (civil servants outside Ottawa) continued apace, and the device of making temporary appointments on political grounds to the inside service almost destroyed the merit system in the decade after 1908.¹

The Civil Service Act (1918) reinforced the prohibition against political activity, by vesting exclusive power of appointment and promotion in the Civil Service Commission rather than in politicians. Section 55 of the Act, which stood unaltered until 1961, stipulated that civil servants were not to engage in partisan work in connection with a federal or provincial election. Nor were they permitted to contribute, receive or deal in any way with money for party funds. The penalty for violating this provision was dismissal.

(d) Orders-in-Council Governing Conflicts of Interest: The Incrementalist Approach

In 1925, the first Order-in-Council (PC 360) was passed to deal with a conflict of interest problem. It directed, quite simply, that if employees were discovered to be selling goods or engaging in trading of any kind during working hours, they could be suspended or dismissed by the deputy head.

Thus began the incrementalist approach to conflict of interest issues. Rather than a general, all-encompassing statement about the appropriate standards of conduct by government employees and officials, specific rules were made as and when a problem arose. This piecemeal approach was within the British tradition of gradualism, of dealing with problems only when they generated enough concern to warrant serious attention, at which point a tailor-made solution would be devised.

In this pattern, another Order-in-Council (PC 1802) appeared on August 7, 1931, stating that, due to the unemployment problem, employees were not permitted to use their annual leave to engage in temporary employment at race tracks, exhibitions, or in the selling of goods of any kind. Alleged breaches of this rule were subject to suspension, investigation and appropriate discipline. Eight years later, this Order-in-Council was rescinded, as part of a review of existing rules by

1. "The Political Rights and Activities of Canadian Public Servants," in Kenneth Kernaghan, ed., Public Administration in Canada (Toronto: Methuen, 2nd ed; 1971), p. 386.

Order-in-Council PC 1/1803. In its place, a more generalized provision, Order-in-Council PC 71/751 was passed on March 29, 1939, stipulating that employees were not to engage in outside employment where their salary was in excess of \$1,200, except where authorized by the Treasury Board.

To clarify matters, a further Order-in-Council (PC 1803) was passed on July 8, 1939, which rescinded the 1931 Order dealing with temporary work at the race tracks, etc. (PC 1802) and indicated that such outside employment would thenceforth be subject to the provisions of the recent new rule contained in PC 71/751. Three years later, on August 19, 1942, PC 128/7359 was passed which suspended PC 71/751 and empowered deputy heads to authorize outside employment. On August 27, 1947, Order-in-Council PC 192/3465, stipulating that employees making up to \$1,600 annually could engage in outside employment, superseded PC 71/751.

During the early 1930s, there were some concerns about public servants participating in active politics at the municipal level. An Order-in-Council (PC 95) was passed on January 16, 1932, setting down the rule that public servants not do so unless they had been granted leave without pay for the period of office. This was amended (by PC 2463) on November 7, 1932 so that, at the discretion of the minister, public servants could accept a municipal office providing the money paid to them did not exceed \$500 per annum. Order-in-Council PC 95 was amended again on April 8, 1948 (by PC 1380) to increase the ceiling amount which federal public servants could earn as municipal elected officials to \$900. This amount was increased in 1955 to \$1,000 (by PC 1955-717) and in 1958 to \$1,500 (by PC 1958-1568). Each of the last four amendments included the proviso that the municipal position must not interfere with the performance of the employee's regular duties.

Following the 1930s' initiatives, there was a period of quiet until March 21, 1951, when Order-in-Council PC 3/1440 was passed dealing with government employees engaging in employment outside of their regular duties. In brief, it promulgated these rules:

- employees who wished to have dual employment with the government could do so only with the permission of the Treasury Board;
- outside employment could not be of a nature that would be in conflict with the government's work nor could it be politically partisan; and
- deputy heads were given the authority to limit or terminate the outside employment of an employee in cases

where it was considered that the employee was either prevented from carrying out his duties or impaired in his efficiency in the public service.

This Order-in-Council remained in effect until December 18, 1973, when it was revoked by Order-in-Council PC 1973-4064. On this date the Public Servants' Conflict of Interest Guidelines (PC 1973-4065) were approved and tabled by the Prime Minister in the House of Commons.

(e) Rulings Clarifying Application of Rules Governing Ethical Conduct

In the 1950s, a common-sense ruling clarified a principle regarding remuneration received from departmentally approved outside employment. It serves as an example of how rulings from time to time fleshed out the meaning and application of the rules governing ethical conduct. In 1957, Auditor General Watson Sellar wrote to Deputy Minister of Finance K.W. Taylor, requesting direction on the handling of a case where an employee received an honorarium from a private firm for having participated in an activity outside his regular duties. The employee had permission from the department to participate and also had his travelling expenses paid by the department. Mr. Sellar wished to know what should happen to the money which had now been received from the company; it was decided that the employee should reimburse the department for the expenses.

(f) 1960s Review of Conflict of Interest Policies

By 1960, the time had arrived to reconsider some of the rules limiting the political activity of public servants. On August 12, 1960, Order-in-Council PC 1960-1121 was passed which revoked Order-in-Council PC 95 as amended. Thus the specifically tailored provisions about participation in municipal politics as an elected representative were gone.

The effect of patronage on appointments to positions falling under the Civil Service Commission had dwindled and by then 131,953 persons out of a total civilian public service of 344,362 were subject to the restrictions on political activity. While acceptance of the merit principle by exempt groups varied from one agency to another, political appointments and partisan activities were more common in agencies not covered under the Civil Service Act.

The revised Civil Service Act of 1961 retained the prohibition against partisan work and incorporated the recommendation of the Report of the Civil Service Commission on Personnel Administration in the Public Service made in December 1958 by the Chairman of the Commission, Mr. A.D.P. Heeney. The

key concept of the Heeney recommendation implemented in the Civil Service Act (1961) was the provision of an inquiry before dismissal. Prior to 1961, no inquiry process existed. The text of the relevant section of the 1961 Act is as follows:

Political Partisanship

61. (1) No deputy head or employee shall

- (a) engage in partisan work in connection with any election for the election of a member of the House of Commons, a member of the legislature of a province or a member of the Council of the Yukon Territory or the Northwest Territories; or
 - (b) contribute, receive or in any way deal with any money for the funds of any political party.
- (2) Every person who violates subsection (1) is liable to be dismissed.
- (3) No person shall be dismissed for a violation of subsection (1) unless the alleged violator has been given an opportunity of being heard, personally or through his representative.

This recommendation suggested that charges of political partisanship in violation of any of the stipulated provisions could be laid by any person in writing to a minister of the Crown, supported by an affidavit. Once this was done, the employee in question was to be suspended pending the results of an enquiry by the Minister of Justice. If found guilty, he or she was to be dismissed; and if innocent, he or she was to be reinstated with no loss of pay.

On November 30, 1964, Prime Minister Pearson wrote to his Cabinet ministers emphasizing the importance of maintaining high standards of conduct and the need for their staff to maintain the same high standards. The areas covered by that letter form the basis of the main principles of the guidelines in use today. In fact, one of the paragraphs in the Prime Minister's letter has been used almost verbatim in the current Public Servants' Guidelines:

It is by no means sufficient for a person in the office of a Minister - or in any other position of responsibility in the public service - to act within the law. That goes without saying. Much more is required. There is an obligation not simply to observe the law but to act

in a manner so scrupulous that it will bear the closest public scrutiny. The conduct of public business must be beyond question in terms of moral standards, objectivity and equality of treatment.

Mr. Pearson also warned against:

- giving preferential treatment to persons on the grounds of personal acquaintance or sympathy;
- ministers and their staff placing themselves in a position where they might be under obligation to anyone who might profit from special consideration or who might seek special treatment;
- having a pecuniary interest that could conflict with official duties; and
- using official information for personal gain.

As Professor Kernaghan has pointed out:

Despite this letter, which became known as Mr. Pearson's "Code of Ethics", scandals subsequently erupted which led to the resignation of Cabinet Ministers, legislators and ministerial assistants. Popular interest in the ethical conduct of public officials subsided during 1967, however, and no action was taken in response to suggestions that a more formal code of ethics be formulated and that it apply to public servants as well as elected officials.²

In 1967, when the Public Service Employment Act was passed, it required that employees wishing to participate in provincial and federal politics obtain a leave of absence from the public service. Leave could be refused if it was considered that the employee's future usefulness to the public service might be impaired by such participation. The Act also prohibited other types of political activity such as working for or against a

2. Kenneth Kernaghan, "The Ethical Conduct of Canadian Public Servants," Optimum, 4, No. 3 (1973), p.6.

candidate in a provincial or federal election. Participation in municipal politics by public servants was a matter which continued to be dealt with by the Treasury Board.

The significance of the Public Service Employment Act (1967) as it relates to the political activity of employees lies not in the fact that restrictions are set out, but rather in the granting of additional rights, namely to run for office and to make financial contributions. In terms of prohibitions, the principle and universal prohibition addresses the issue of working for, on behalf of or against a candidate or political party.

In terms of the granting of leaves of absence, a leave of absence is only granted by the Commission in the instance where the employee wishes either to stand for nomination or run for office. There is no provision for the Commission to grant leaves of absence for any other purpose related to political activity.

On October 2, 1967, Mr. O.G. Stoner, then Deputy Secretary of the Privy Council Office, wrote to the Prime Minister indicating that he felt that the controls for conflict of interest were "haphazard" in comparison to those in the United Kingdom and the United States. It was suggested that the Prime Minister request the President of the Treasury Board to establish general regulations.

The Prime Minister agreed and Mr. Robertson, then Clerk of the Privy Council, wrote to the Secretary of the Treasury Board, on January 11, 1968, asking him to undertake a study and develop a system of guidelines. As a result, Treasury Board issued guidelines in 1969 relating to discipline in regard to conflicts of interest.

On July 15, 1968, Mr. Robertson raised with the Prime Minister the question of the arrangements ministers should make to avoid any conflicts of interest arising out of corporate connections or financial arrangements. In particular, he referred to the Manual of Official Procedure, page 350, which stated:

No conflict should exist or appear to exist between a minister's private interests and his public duties. Upon appointment to ministerial office he is therefore expected to arrange his private business in a manner that will prevent conflicts of interest from arising. This may mean the abandonment of certain company directorships.

Cabinet agreed to discuss the basic principles for the avoidance of conflicts of interest and, in September 1968, the President of the Privy Council was assigned responsibility for

reviewing the issue of conflict of interest. Two research papers on this subject were prepared for the President of the Privy Council, one by Professor Jeremy Williams of the University of Alberta and the other by Professor Yvon Marcoux of Laval University. The Williams paper was submitted in September 1969, and the Marcoux paper in June 1970; they were subsequently tabled in the House of Commons.

Recognizing that conflicts of interest are "infinitely various", Williams stressed the need to limit the breadth of the term, "so that only personal and immediate pecuniary interests can be said to give rise to conflicts." Such a limitation he considered to be the appropriate point at which to define the balance between public benefit and individual advantage.

He pointed to those dangers which may result from actual or apparent conflicts of interest, stating that "it depends very largely on the surrounding circumstances as to whether actual or apparent conflicts of interest are acceptable or are evils to be struck at by legislation or other appropriate device." A distinction was made between public servants, legislators and Cabinet ministers; he stated that beyond "laying down certain basic rules for these persons, it will be better to let them be guided by their own ethics and conscience." Further, he suggested, this field of conflict of interest "may well prove to be incapable of regulation," reflecting his view that the "circumstances of the case may vary greatly with the type of position involved and the type and magnitude of the interest."

Williams set out certain "cardinal rules" designed to prevent the most obvious and objectionable forms of conflicts and formulated "secondary" rules which did not reduce the need to observe the spirit as well as the letter of any rules promulgated. Pointing out that general responsibility is placed on the individual in the first place, he outlined enforcement remedies including criminal punishment, reprimand, removal, invalidation (of decision of influenced individual), and divestment of interest. He concluded that it was unlikely that conflict problems could be resolved by the formulation of rules. Instead, he said, it would be necessary for the letter and spirit of certain principles to be observed. These principles would vary according to the position and the situation. One of his final statements was: "The solution appears to be to give a tribunal some discretion within clearly defined limits."

Professor Yvon Marcoux advocated an approach similar to that of Professor Williams. Marcoux summarized studies on the question of conflict of interest and suggested areas for additional research prior to the formulation of definite proposals. He stated that the importance of regulating conflict

of interest "increases with the government's ever-expanding intervention in a variety of fields of activity." His reasons for such control paralleled those of Professor Williams. They are: (1) to ensure the efficiency of government administration; (2) to guarantee equal and impartial treatment of all citizens; (3) to prevent a person holding public office from using information acquired in the discharge of his or her duties in order to promote his or her own personal interests; and (4) to maintain the integrity of parliamentary and governmental institutions, in order to inspire the public's respect and retain its confidence.

He recommended the appointment of special Commons and Senate Committees to look into the drafting of a code of ethics and rules respecting disclosure of financial interests for MPs and Senators. Ministers would have to meet "special requirements" beyond those applying to other parliamentarians. With respect to members of regulatory bodies, Marcoux stated that the government should adopt a policy of including in the constituting statutes of all such bodies, provisions that restrict their members from having direct or indirect interests in enterprises or activities in the field subject to their regulation.

Finally, Marcoux recommended that the report of the New York City Bar Association's Special Committee on Congressional Ethics be adopted for federal parliamentarians. The report contains a proposed model code of conduct and rules concerning disclosure of financial interests.

(g) The 1970s: A Decade of Establishing Written Guidelines for Ethical Conduct, Considering the Position of Parliamentarians and Revising Political Activity Rules for Public Servants

All the contemplation of the problem during the 1960s led to action in the 1970s when written guidelines of a comprehensive nature appeared.

The Williams and Marcoux papers became, to a degree, working documents for an Interdepartmental Committee established in April 1970 at the request of Mr. Robertson, Clerk of the Privy Council. This Committee, chaired by Mr. Jean Boucher, Deputy Minister of Supply and Services, and comprised of deputy heads from the departments and agencies most directly concerned with the conflict of interest topic, was instructed to develop an approach to regulating conflict of interest for public servants. The final report of the Committee was submitted to the President of the Privy Council in March, 1972.

Noting that up until that time tradition had kept conflict of interest problems to a minimum in the public service, the Committee nevertheless stated that "a more explicit system" was required if this good record was to be maintained. In general

terms, the Committee agreed that such a system would provide public servants with a more specific idea of what was expected of them, give their superiors a clearer basis from which to judge or direct the conduct of their employees, and inspire greater trust and confidence on the part of the public. The Committee proposed a set of specific, "minimum rules" to apply, in principle, to all public officials, including persons appointed by Governor-in-Council and members of the Armed Forces and the Royal Canadian Mounted Police. These rules also could be adopted for the staff of Crown corporations.

The Committee identified ten broad areas of potential conflict which are still of concern today. The "overriding principle" identified by the Committee was that "a public official, in the performance of his duties, should serve the public interest and where he is faced with a choice between his personal interests (or any other interest) and his public duties, he must choose the latter." In addition, the Committee concluded that:

- a set of rules was required which, without being excessively detailed, would provide meaningful guidance for public officials;
- the application of any code of rules regarding conflicts of interest should take into account the nature and extent of the responsibilities of the public official, and his or her private interests which happen to be in potential conflict with the public interest;
- the rules should call for public officials to disclose potential or actual conflicts, before their appointment, to the appointing authority and after appointment, to their superiors so that, where appropriate and feasible, the personal interests could be retained and an official decision made regarding the manner in which the conflict was to be controlled or merely recorded;
- the post-employment problems it was felt could not be dealt with effectively in rules intended to bind public officials only. But since this was an important problem, the Committee recommended that a government statement be made on the subject, preferably at a time when it was not a public issue;
- taking into account the infrequency of incidents of this nature, it would be unwise to attempt to fix a rule beyond the provisions of the Public Service Employment Act concerning the right of public servants to participate in political activities; and

- the rules must refer specifically to the improper use of confidential information since this is a major source of conflicts of interest.

The conclusion of the paper was that it was timely for the Government to adopt a set of rules on conflict of interest in the public service and that a minimum code could be developed and applied. Treasury Board should administer the code for the public service but the system should extend to "as many public officials and servants of the State as possible."

Professor Kernaghan has written that,

During 1972, widespread public interest in the ethical standards of public officials was rekindled by vigorous mass media coverage of alleged conflicts of interest involving Ontario Cabinet ministers and resulting in a minister's resignation. Also, in the summer of 1972, two senior public servants in the Department of Regional Economic Expansion were suspended for allegedly "authorizing an incentives grant to a company in which they had a direct financial interest by holding shares in it".

It was clear from discussion of these incidents that both the general public and legislators were confused and in disagreement as to what kinds of activity constituted conflicts of interest. Some guidelines or rules of conduct were required.³

In the Speech from the Throne, on January 4, 1973, the Governor General announced that proposals dealing with conflicts of interest as they may affect members of Parliament, ministers of the Crown and public servants would be brought before the House. On January 8, 1973 the Government gave notice in the House of Commons of its intent to establish regulations for three possible categories of conflict of interest.

Beginning in 1973 there was an increase in interest in the subject of conflict of interest as it related to members of

3. Kenneth Kernaghan, ibid., p.8.

the House of Commons and the Senate. On January 7, 1973, Mr. Stanley Knowles (MP Winnipeg-North Centre) introduced Bill C-38 in the Commons, dealing with disclosure of financial interests by senators and members of the House of Commons. The Bill was reintroduced in the next session as Bill C-158 but was not given second reading. Also, in answer to a specific query in the House, Prime Minister, on June 8, 1973, you said that "an effort will be made by the Government to reconcile the very real desire of the people of Canada to have people of eminence in their service, with the important principle of avoiding a conflict of interest situation where such a person would serve his own personal interest in serving the public."

Several other studies and suggestions were received by the Privy Council Office. A sequence for dealing with the various proposals was suggested. A distinction was drawn between ministers, members of Parliament and Governor-in-Council appointees on the one hand, and public servants on the other. The former group was said to have fiduciary responsibilities while the latter was treated as being in a master-servant relationship. This distinction was considered unsatisfactory in that it was hard to see a systematic and coherent application or to envision a suitable public policy based upon it.

As Professor Kernaghan relates:

Most of the events recounted to this point have involved elected officials rather than public servants. Actually, very few instances of unethical conduct by public servants have come to public light - in part because there appears to be relatively few cases and in part because discipline in such cases is handled within the public service unless the offence is grave enough to fall within the jurisdiction of the regular courts. The publicity given to conflict of interest problems involving elected officials has, however, had a "spillover effect" on the status of public servants. There is a logical progression from concern about Cabinet ministers to concern about their deputy ministers who have access to much confidential information and who are extremely influential in the policy process. It follows also

that guidelines should be set out for other public servants whose positions might involve them in ethical problems.⁴

By 1973, Cabinet had adopted the basic principle taken from Prime Minister Pearson's letter on the subject to Cabinet Ministers in 1964. It is this statement which provided the basis for the current Public Servants' Guidelines and, by reference, those for Governor-in-Council appointees. In mid-1973, four memoranda on the subject of conflict of interest were considered, which related to ministers, members of the House of Commons, Governor-in-Council appointees and public servants.

In July 1973, the Honourable Allan MacEachen, President of the Privy Council, tabled a Green Paper entitled Members of Parliament and Conflict of Interest. The paper included a draft Independence of Parliament Act which was to apply to members of the Senate and House of Commons. The purpose of the Act was to ensure that the independence of parliamentarians in the performance of their duties was not affected by their private interests. Mr. MacEachen stated in the House, "Members and Senators are trustees of public confidence who must perform, and appear to perform, their duties in a manner reflecting the highest degree of concern for the public interest."

Also in July, 1973, Prime Minister, you made a statement in the Commons regarding conflict of interest explaining the requirement for ministers to resign directorships in commercial corporations and positions on certain boards, and to sever all business, commercial and professional associations while they were cabinet ministers. The requirement was outlined for them to arrange their personal holdings in a way that would prevent conflicts from arising and the blind and frozen trust options available for this purpose were explained. Much of this had been the policy of the government for several years, and reference was made to giving up directorships and placing assets at arm's length as early as August 1968. It was indicated that these rules would be put in the form of guidelines as soon as Parliament had a chance to consider the Green Paper.

On December 18, 1973, Prime Minister, in announcing the government's policy, you stated that it clarified for the public service "responsibilities which, although they are not new or additional to the traditional one long understood by Public Servants require restatement and formal publication." You said that it "is as much a benefit to the employee as it is to the employer to have clear standards apply," and reiterated the belief

4. Ibid.

that "in setting standards, it is important not only to protect the public interest adequately, but also to protect the rights of those who are affected by the standards." You announced that ministers would have another option for dealing with non-personal property besides total divestment by sale, or the use of a blind or frozen trust, namely public declaration of certain assets that would not likely be a source of conflict. Additional types of property that could be considered as exempt were also announced.

You said that Governor-in-Council appointees should also be provided with guidelines and that they would be expected to adhere to standards similar to those for Cabinet ministers. It was indicated that there would be a set of standards and procedures for employees of Parliament, and that this subject should be referred to the Commissioners for Internal Economy for employees of the Senate. To date, no standards or guidelines for this group have been produced.

At this time, it was announced that Crown corporations and agencies would be encouraged to develop standards and procedures appropriate to their own organizations and to apply them. Shortly thereafter, on December 28, 1973, you wrote a letter to Cabinet ministers outlining the procedures they must follow to avoid certain activities which could be a potential source of conflict and explaining the details of the public declaration option.

On December 31, 1973, the Secretary of the Treasury Board wrote deputy heads advising them of the application of conflict of interest guidelines to the public service and emphasizing the need for all public servants to comply with them. Departments were encouraged to expand on the guidelines so as to adapt them to their special circumstances. This circular contained what seems to have been the first directive regarding the non-acceptance of gifts that could bring suspicion upon the public servant's objectivity.

In May and June of 1974, the Office of the Assistant Deputy Registrar General was established to administer the guidelines for ministers, their exempt staff and Governor-in-Council appointees. On November 8, 1974, Conflict of Interest Guidelines for Persons Appointed to Public Office by the Governor-in-Council came into effect, stating that Governor-in-Council appointees must adhere to the specific provisions contained in the guidelines, and that they must also adhere to the Public Servants Guidelines as a minimum. When these guidelines were introduced, it was decided to apply them initially only to certain senior officials and then, gradually, to bring more categories of Governor-in-Council appointments under their protection.

In June 1975, you wrote, Prime Minister, to all Lieutenant-Governors asking them to comply with three special guidelines which were similar to the Governor-in-Council Guidelines. In 1978, the application of the guidelines was extended to cover high commissioners and ambassadors and was subsequently applied to all heads of post. The Governor-in-Council Guidelines do not and never were intended to apply to part-time Governor-in-Council appointees.

The Green Paper was retabled on November 27, 1974, and was referred to the Standing Committee on Privileges and Elections. On April 9 of the next year, it was retabled in the Senate. In 1975 and 1976 the House Standing Committee on Privileges and Elections and the Senate Standing Committee on Legal and Constitutional Affairs submitted their reports on the Green Paper. Neither was debated in the House of Commons or the Senate.

On November 20, 1975, special guidelines were approved for ministers' exempt staff. These have since become defunct and exempt staff are now subject to either the Ministers' Guidelines or the Public Servants' Guidelines. It is normally expected that executive assistants and senior policy advisors will be subject to the Ministers' Guidelines; other exempt staff are subject to one of the two régimes, according to the discretion of the minister.

The Independence of Parliament Act, Bill C-62, was introduced and given first reading in the House on June 26, 1978. The Bill died on the order paper when the session ended on October 10, 1978. On October 16, the Bill was reintroduced with revisions as Bill C-6, An Act Respecting the Independence of Parliament and Conflicts of Interest of Senators and Members of the House of Commons and to amend certain other acts. On March 8, 1979, the Bill was given second reading and referred to the Standing Committee on Privileges and Elections but died on the order paper when the session ended on March 26, 1979.

On August 1, 1979, Prime Minister Clark introduced new Conflict of Interest Guidelines for Ministers. Five significant departures were made from the previous guidelines:

- The guidelines were made to apply to spouses and dependent children of ministers, as well as to ministers themselves, in order to ensure that assets of the entire family unit were covered.
- Ministers could no longer place assets in a 'frozen trust', a device under which the beneficiary may not control the assets but continues to know what those assets are.

- Assets which had to be sold or placed in a blind trust were defined to include large amounts of foreign currencies, and larger loans to persons outside the minister's family.
- Rules for blind trusts were expanded. Those acting as trustees had to include a government-designated trustee, chosen from among a list of recognized trust companies, who would be particularly responsible for ensuring that operation of the trust met the guidelines and who, in that role, would have the conclusive vote in any decision of the trustees.
- Gifts of a value exceeding \$100 received by a minister or family member from someone outside the family had to be disclosed within 30 days.

The rules for ministers outlined in your letter, Prime Minister, of December 28, 1973 were classified as confidential, on the basis that they formed part of a Cabinet document. It seems strange that rules governing how Cabinet ministers had to deal with conflicts of interest should have remained secret - especially in light of the interest in fostering a public perception that such matters are being satisfactorily dealt with. The Ministers' Guidelines were made public on August 7, 1979.

(h) The Development of Approaches to the Post-Employment Activities of Public Office Holders

Several early studies conducted in the area of conflict of interest identified the need for the government to consider post-employment activities as a potential area of conflict, namely the Williams paper, the Marcoux paper, Report of the Interdepartmental Committee on Conflict of Interest (1972) and several Cabinet documents.

A number of problems surfaced in this area. A study was undertaken in the Privy Council Office in 1975-76 of the need for formulating government policy regarding the post-employment activities of former public servants. The policies of other governments were examined and the study found that policies of a differing nature and approach existed in the United Kingdom and the United States. The problems potentially caused by the activities of former public servants were analyzed, and effective and equitable means of dealing with the issue were considered. It was concluded that it was in the best interests of the government, the public and government employees to adopt a clear and coherent policy on this subject.

In March and April of 1976, concern was expressed in Parliament and in the press regarding the commercial activities of

two former deputy ministers (the "Reisman-Grandy situation"). At that time, Prime Minister, you indicated to the House of Commons that the government was concerned about certain practices of former public servants and that the matter was being studied with a view to producing guidelines in the near future. The adoption of certain principles was considered, which would restrict the ability of former government employees to (1) accept employment with firms with which they have had an official working relationship; (2) change sides to represent or aid commercial corporations with respect to matters which were dealt with by, or were under the jurisdiction of, former public servants while they were employed by the government; and (3) lobby or give advice concerning departments or agencies of government with which the former public servants were employed or had a close working relationship.

It was deemed important that the government provide to the public and to public servants a concrete indication of the standards expected of former government employees. This consideration supported the formulation of specific principles. The adoption of principles, the application of which would be determined as necessary by an advisory body, also seemed to afford the most flexibility in the implementation of the policy and its modification at a later date. On October 7, 1976, the Cabinet adopted the principles and the policy.

You wrote to your Cabinet ministers on October 8, 1976, to request that they and those under their authority comply with the spirit of the policy and guidelines until steps could be taken to complete the implementation of the program. Appendices I-V were attached to your letter, which are referred to as the Post-Employment Guidelines and which were tabled in the House of Commons on December 17, 1976. On February 14, 1977, you confirmed that Appendix IV of the Post-Employment Guidelines, which dealt with administrative arrangements, would be extended to apply to members of the Armed Forces and the Royal Canadian Mounted Police.

On December 29, 1977, Cabinet ministers were advised that the Post-Employment Guidelines would come into force on January 1, 1978. It was indicated that the Post-Employment Guidelines were to apply to ministers, ministers' exempt staff, parliamentary secretaries, Governor-in-Council appointees and public servants at and above the SX-1 level. Although the application of the Post-Employment Guidelines was not retroactive and therefore did not apply to ministers already in office, all ministers were asked to continue to be guided by them as a matter of honour and personal choice. The 1976 version of the Post-Employment Guidelines had indicated that they were to be a "condition of employment" but this requirement was changed to "honor and personal choice" in the 1977 version. A number of ministers in that government, because they were appointed prior to

that date, were not required to observe the Post-Employment Guidelines until they were reappointed as ministers, two elections later. Amended Post-Employment Guidelines were tabled in the House on April 24, 1978. This amended version is the one in use today for public servants and Governor-in-Council appointees.

Modifications to the Post-Employment Guidelines were distributed on August 1, 1979 to Cabinet ministers as a régime specifically for them. This group was thus removed from the umbrella of the universal Post-Employment Guidelines. These Post-Employment Guidelines were adopted on April 28, 1980 by the new government of Prime Minister Trudeau, with some minor grammatical changes. They were issued to all Cabinet ministers on April 28, 1980 and were tabled in the House on May 1, 1980.

At that time, the Post-Employment Guidelines for Ministers were modified to apply to parliamentary secretaries. Although there were some changes in wording, and the cooling-off periods were reduced, the substance remained the same. Parliamentary secretaries had previously been subject to the universal set of Post-Employment Guidelines. Parliamentary secretaries were advised on April 29, 1980 that they would be required to observe the Post Employment Guidelines and a copy of the guidelines was attached to each letter.

On April 30, 1980, you advised Cabinet ministers that designated exempt staff members (at least executive assistants and senior policy advisors) should thenceforth be subject to the Ministers' Guidelines.

In summary, the current situation is that there are three sets of Post-Employment Guidelines in use:

1. Post-Employment Guidelines applicable to public servants and Governor-in-Council appointees;
2. Post-Employment Guidelines for Parliamentary Secretaries applicable to parliamentary secretaries; and
3. Post-Employment Guidelines for Ministers applicable to ministers and designated ministers' exempt staff.

(i) Into the 1980s: Refinements to Existing Guidelines and a Major Policy Review

Conflict of interest and post-employment guidelines for ministers, being the prerogative of the Prime Minister, are subject to change when the government changes. Changes were made for the Government of Joseph Clark, and further changes were made

by you Prime Minister, in 1980. The Ministers' Guidelines were modified in three ways:

- the clause regarding spouses and dependent children was removed, although it was stated that ministers must not transfer their holdings to their spouses or dependent children as a means of avoiding application of the guidelines.
- retention trusts were introduced. This form of trust protected the rights of the minister as a consequence of other arrangements intended for estate planning purposes. All moneys earned were required to be put back into the trust.
- further provisos regarding the care that had to be taken with conflict of interest matters were added.

The new guidelines, dated April 28, 1980 were tabled in the House and the subject of a press release on May 1, 1980. Cabinet ministers were requested to abide by them, as were parliamentary secretaries and ministers' exempt staff.

Late in 1981, the Secretary of the Treasury Board initiated a review of departmental and agency experience in the application and administration of the Conflict of Interest and Post-Employment Guidelines. The review confirmed the existence of wide variations in departmental approaches and the subsequent report recommended ways of providing some measure of consistency. Note was taken of concerns expressed by some officials about the Post-Employment Policy and Guidelines.

In February 1982, Treasury Board agreed that the costs of establishing and maintaining trusts to comply with the guidelines would be paid by the government. The annual limit on the amount paid is one-half of one per cent of the market value of the assets being administered for any one individual.

On March 30, 1983, the late Honourable Walter Baker introduced Bill C-679, An Act Respecting Standards of Conduct for Public Officers and on November 29th, Mr. Howard Crosby, Member of Parliament for Halifax West introduced Bill C-700, An Act to Provide for the Control of Conflicts of Interest in Government Affairs. It was reintroduced on December 19, 1983 as Bill C-208. Such Private Members' Bills are representative of the concern about policy and procedures governing conflict of interest situations which is raised from time to time by parliamentarians.

Three sets of conflict of interest guidelines are currently in existence.

1. Public Servants Guidelines applicable to public servants, Governor-in-Council appointees, and some ministers' exempt staff.
2. Governor-in-Council Guidelines applicable to full time Governor-in-Council appointees at and above the EX-1 level.
3. Ministers Guidelines applicable to ministers, and designated ministers' exempt staff.

There are also the basic principles to which parliamentary secretaries are expected to adhere, which are set out in a letter but are not in the form of guidelines. The rules applicable to Lieutenant Governors are included in an exchange of letters.

A major development in this area was, the appointment on July 7, 1983, of our Task Force on Conflict of Interest to review in a major way all of these policies and procedures as they have evolved and to consider whether new approaches should be devised at this stage of our history.

CHAPTER 8

SYNOPSIS OF THE PRESENT FEDERAL CONFLICT OF INTEREST LAWS, GUIDELINES AND POLICY

The following synopsis of the present federal conflict of interest laws, guidelines, and policies will provide a basis for understanding comments and recommendations elsewhere in this report. The complete texts of the laws, guidelines and policies referred to in this chapter can be found in Appendix C.

(a) Criminal Code Provisions

1. Section 108 - Bribery

Section 108 of the Criminal Code provides that no judicial office-holder or member of Parliament or a legislature may accept or obtain, agree to accept or obtain, or attempt to obtain, money or any kind of preferential consideration for himself or herself or anyone else in a corrupt manner. Nor may individuals give or offer corruptly such money or favours to judicial office-holders or members of Parliament or a legislature. The penalty for this offence is imprisonment up to 14 years.

2. Section 110 - Frauds Upon the Government (Gifts)

Persons are prohibited by section 110 of the Code from making or accepting any bribes in connection with the functioning of government. Officials and employees of government are further prohibited from soliciting or accepting gifts (unless they have the consent in writing of the head of the branch of government that employs him or of which he is an official) from anyone who has dealings with the government. The penalty for these offences is imprisonment up to five years.

3. Section 297 - Refusing to Deliver Property

Anyone who is entrusted with government property for the purpose of delivering it, and refuses to do so upon request, is liable by virtue of section 297 of the Code, to imprisonment for 14 years.

4. Section 357 - False Return by a Public Officer

Anyone authorized to deal with public revenues who knowingly makes a false statement or return is liable to imprisonment for five years, section 357 of the Code stipulates.

5. Section 682 - Disability to Contract and Removal of Disability

Section 682 provides that persons convicted under section 110 may not contract with the government from that point on unless they have received a dispensation from the Governor-in-Council or unless the conviction has been set aside.

(b) Criminal Type Offences in Other Statutes

A number of Acts pertaining to the work of the government contain specific clauses on activities which are prohibited. In some cases, the penalty for not observing such clauses is indicated in the Act. Four examples are the Immigration Act, the Financial Administration Act, the Unemployment Insurance Act, and the Income Tax Act.

1. Immigration Act

Immigration officers and adjudicators who make false statements, participate in bribes, contravene the Immigration Act, or contribute to its contravention, are subject to a heavy fine and a jail term if convicted. The same holds true for anyone impeding the work of or impersonating an immigration officer or adjudicator. In addition, any person who contravenes the Act in any way commits an indictable offence.

2. Financial Administration Act

It is an offence punishable by fine and imprisonment for persons responsible for receiving public money to receive unauthorized money; to participate in any fraud on Her Majesty; to permit any violation of the law; to falsify any certificate, return or entry in any book; to fail to report any known violation of any revenue law; and to demand or accept any money or thing of value for the settlement of any charge of violation of the law. It is also an offence for anyone to bribe any person dealing with public money and for any person to accept or receive such a bribe.

3. Unemployment Insurance Act - Part V

Information obtained under the Unemployment Insurance Act is confidential and is not to be revealed unless required in

accordance with the enforcement or interpretation of the Act. Persons contravening the Act are guilty of an offence punishable by a fine, a jail term, or both.

4. Income Tax Act - Part XV

No person may, without authorization, communicate any information or allow access to any information obtained under the Income Tax Act. Contravention of this stricture is an offence punishable by a fine, imprisonment or both, pursuant to section 241(9).

(c) Civil Liability Under Certain Statutes

There are other statutes of a similar nature, whose penalties involve civil liability rather than criminal sanctions. For example, under the Financial Administration Act, Part XI, employees can be held accountable and can be held financially responsible for money improperly handled by them in certain cases.

(d) Prohibited Interests under Specific Statutes

Certain other statutes that govern the operation and activities of those working in the service of the federal government contain rules about conflict of interest. The National Energy Board Act, for example, states that board members may not hold interests in energy companies and similar investments which could cause a conflict with their official duties.

(e) Conflict of Interest Provisions Affecting Parliamentarians

Members of Parliament are subject to conflict of interest rules which are found in the House of Commons Act, the Senate and House of Commons Act, the Standing Orders of the House of Commons, the Criminal Code, the Canada Elections Act, the Rules of the Senate, and the laws and usages of the Parliament of the United Kingdom as preserved by section 18 of the British North America Act.

Members must not accept bribes or prohibited fees, nor can they hold offices incompatible with their membership in the House (such as an office or employment elsewhere in the government to which a profit is attached, positions such as a provincial legislator, sheriff, clerk of the peace, registrar of deeds or county Crown Attorney).

With a few exceptions, members of the House and senators may not be a party to a government contract which will result in their receiving public funds. Certain financial interests held by members and senators are considered to be incompatible with

holding office and, as such, they are not permitted to vote on issues in which they have a pecuniary interest.

(f) Provisions of the Public Service Employment Act

Section 32 of the Public Service Employment Act sets the limits of political partisanship activities by public servants. It states that no deputy head and, except as authorized under this section, no employee may work for, on behalf of or against a candidate for election to the House of Commons, a provincial legislature or a member of the territorial councils, or work for, on behalf of or against a political party. It is permitted to attend a political meeting and also to contribute money for the funds of a candidate or political party.

(g) Provisions of the Public Service Staff Relations Act

The Public Service Staff Relations Act contains certain prohibitions regarding the participation in and the interference with the activities of employee organizations and other actions which may not be taken by individuals employed in a managerial or confidential capacity. In general, no one may refuse to employ or discriminate against an employee because of his or her membership in an employee organization. Also prohibited is any attempt to dissuade an employee from being a member of the employee organization. Employee organizations may not use the employer's premises during working hours to conduct business related to membership.

(h) Cabinet Ministers Guidelines

The conflict of interest guidelines for ministers of the Crown apply to ministers and, at their discretion, to members of their exempt staff. As a minimum, they normally apply to executive assistants and senior policy advisors. In addition, there are also post-employment guidelines for ministers.

The underlying principles of the Ministers' Guidelines are that the onus for preventing conflicts rests with the individual; ministers must arrange their private affairs so as to preserve the public interest; and ministers must not take advantage or appear to take advantage of their positions or of information that is gained by way of their positions that is not generally available to the public.

On appointment, or soon after, Ministers must: cease to practice a profession or to operate any business or commercial activity and to manage controlled or non-exempt assets; not serve as paid consultants; not accept or retain directorships or offices in commercial corporations, although there is leeway in the case of philanthropic organizations; and not participate actively as members in unions or professional associations.

Ministers are warned by these guidelines against giving preferential treatment to friends and relatives and are cautioned against placing themselves under obligation to others whom might profit from favours. They are expected to disclose in the Public Registry all gifts or other benefits they receive which are valued at over \$200 excluding personal and official gifts or hospitality from other governments.

The personal holdings of ministers are divided into exempt assets, discloseable assets and controlled or non-exempt assets.

"Exempt assets" include: residences and recreational property used or intended for use by ministers or their families; household goods and personal effects; automobiles; boats and other means of transport for personal use; works of art; cash and deposits (but not cash or deposits in foreign currency held for investment or speculative purposes); Canada and provincial savings bonds; registered retirement savings plans that are not self-administered; self-administered registered retirement savings plans composed exclusively of exempt assets; registered home ownership savings plans; investments in open-ended mutual funds; guaranteed investment certificates and similar financial instruments; income averaging and other annuities; accrued pension rights; life insurance policies; money owed by a previous employer, client or partnership; family loans and personal loans under \$5,000 to any individual.

For these, there is no requirement for public disclosure. In general, there are no restrictions on dealing with property which is for personal use.

"Discloseable assets" are those which are unlikely to give rise to conflicts and which may be disclosed in the Public Registry. They include ownership interests in family businesses or other businesses of a local character whose shares are not traded publicly and which do not contract with the government or control shares in public companies; farms; real property other than that which is exempt; and the beneficial ownership of the assets of trusts other than blind trusts.

All assets which are not either exempt or discloseable are therefore considered to be controlled or non-exempt assets. Discloseable assets that are not disclosed are to be treated like controlled assets. These must either be sold or placed at arm's length in a blind trust. "Controlled assets" include: publicly traded securities of corporations and governments; interests in partnerships, proprietorships, joint ventures, private companies and family businesses which are not discloseable assets; stock options (except those of private companies referred to above under

"discloseable assets"); self-administered registered retirement savings plans, except those composed exclusively of exempt assets; real property which is not an exempt or discloseable asset; commodities, including metals, and foreign currency for speculative or investment purposes; interests in profit sharing plans; and loans that exceed \$5,000 to individuals not connected with the minister concerned by blood relationship, marriage or adoption.

The procedures for establishing a trust, appointing trustees and maintaining the trust are very specific in terms of what may and may not be done.

A minister who has established a holding company for estate planning purposes may establish a retention trust for dealing with this asset.

If a minister is the executor or trustee of an estate, he or she must disclose this fact to the Prime Minister through the ADRG and take steps to ensure that conflicts do not arise out of such involvement.

Although the spouses and dependent children of ministers are not required to abide by the guidelines, ministers are cautioned that they should be careful to ensure that conflicts do not arise out of the interests of family members.

The guidelines contain detailed procedures on compliance in terms of administrative detail. They also contain a reminder that ministers are subject to the Senate and House of Commons Act.

The Post-Employment Guidelines for Ministers indicate that ministers should not be influenced in their official duties by prospects of future employment. When such offers are received, ministers are expected to advise the Prime Minister before accepting any position, especially where the position could cause a conflict of interest. Further, when seeking future employment, ministers must ensure that there is no real or apparent conflict of interest. After they have left office, ministers are required to conduct themselves in such a way as to avoid grounds for allegations of improper influence, privileged access and preferential treatment.

After a minister has left office, he or she must not, within a period of two years: accept a position to a board of directors of a company which was in a special relationship with the department or agency for which the minister was responsible; switch sides to work for a company in connection with an activity which involves the government and in which he or she had a personal and substantial involvement on behalf of the government; or lobby the department or agency for which he or she was responsible.

Within one year of leaving office, a former minister must not: accept employment with a company with which he or she had significant direct official dealings; switch sides in connection with any activity which came under his or her jurisdiction; or give counsel for commercial purposes concerning any of the policies or programs for which he or she was responsible on an ongoing basis or with which he or she had a direct and substantial relationship.

(i) Instructions to Parliamentary Secretaries

Parliamentary secretaries do not have a conflict of interest régime as such. At the time of their appointment, they are sent a letter from the Prime Minister advising them of the conduct expected of them and those activities which should be avoided. They are asked to examine, on a continuous basis, the responsibilities they have been assigned as parliamentary secretaries to ensure that there is no possibility of real or apparent conflict. They are encouraged to discuss any matters with their minister where they require guidance.

Parliamentary secretaries are subject to a post-employment régime which parallels that for ministers except that the cooling-off periods are one year and six months respectively. Finally, they are reminded of their obligation to observe the Senate and House of Commons Act.

(j) Policy Governing Ministers' Exempt Staff

Ministers, at their discretion, may designate certain staff to be subject to the Ministers' Guidelines. At least executive assistants and senior policy analysts are to be so designated but in some cases ministers designate their entire staff. Those who are not specifically designated are automatically subject to the Public Servants' Guidelines. With respect to post-employment guidelines, ministers' exempt staff at the equivalent level of deputy head are subject to Ministers' Post-Employment Guidelines while those at or above the EX-1 equivalent level are subject to the same post-employment guidelines as parliamentary secretaries and public servants at the same level.

(k) Governor-in-Council Guidelines

The conflict of interest guidelines for Governor-in-Council appointees apply to those who hold positions at or above the Executive Officer one or equivalent level. The guidelines specifically have not been applied to part-time Governor-in-Council appointees, nor to members of the judiciary or quasi-judicial agencies except by special request.

The conflict of interest guidelines indicate that Governor-in-Council appointees must adhere to the guidelines but must also adhere to the Public Servants' Guidelines as a minimum.

During their tenure, Governor-in-Council appointees are prohibited from engaging in a profession or the management or operation of a business and from retaining or accepting directorships in companies. Some latitude is given for involvement with philanthropic organizations.

As with the Ministers' Guidelines, dealing with property can be handled under three different categories: exempt, discloseable and non-exempt or controlled. Examples of exempt property are: the residence or residences actually used by an official, including a summer or winter residence or farm; personal household goods or effects or other property used for ordinary living and enjoyment; automobiles, boats, snowmobiles and other modes of transport for personal or family use including privately owned aircraft; cash, including cash held in chequing or savings accounts, Canada Savings Bonds, securities of any level of government in Canada or agencies of these governments; registered retirement savings plans, investments made in mutual funds for the purpose of providing retirement income; and debts.

Discloseable assets, which may be the subject of a public declaration, include leasehold interests; real property; private companies, the stocks or shares of which are not traded on public exchanges; and other assets which cannot be easily affected in value as a result of government decisions.

All assets which are neither exempt nor discloseable are non-exempt or controlled and must therefore be divested by means of a frozen trust, a blind trust, or outright sale. The guidelines contain details for the establishing and maintenance of trusts and the selection of trustees.

Since spouses and dependent children are not specifically covered by the guidelines, Governor-in-Council appointees are advised that they must ensure that the interests of family members do not pose conflict of interest problems. They are further advised that any breach of the guidelines could subject them to sanctions including the revocation of their appointment.

Governor-in-Council appointees are subject to the Post-Employment Guidelines for Holders of Public Office as described below in section (n) of this chapter.

(1) Policy Governing Part-Time Governor-in-Council Appointees

When conflict of interest guidelines were announced in the Commons in 1973, it was indicated that they were intended to apply to, among others, Governor-in-Council appointees working full time. Guidelines have never been prescribed, however, for Governor-in-Council appointees working part time.

Part-time Governor-in-Council appointees are subject nevertheless to certain other specific requirements. These include: the enabling legislation of the organization to which they are appointed or the regulations and directives of that organization; the laws of general application, such as the Canada Business Corporations Act, which may apply to their organization; and the Criminal Code. They may impose other requirements on themselves, including adherence to the Governor-in-Council Guidelines if they so desire.

In the government's efforts to help public office holders ensure that their official duties and responsibilities are carried out in accordance with acceptable standards of conduct, policy generally is to encourage organizations to which part-time Governor-in-Council appointments are made, to develop their own rules or practices adapted to their particular circumstances and based on the intent of existing guidelines.

Nevertheless, special attention is given to part-time Governor-in-Council appointees who occupy positions which carry duties and responsibilities and call for the exercise of authority and influence akin to those exercised by full-time Governor-in-Council appointees. Usually, in these cases, the individual is asked to make a full disclosure of interests and involvements to the appropriate official to whom the individual reports; the legislation (pursuant to which the part-time appointee has been named) may provide further guidance as to how appointees may organize their personal affairs so as to avoid conflicts; and the protection of the Governor-in-Council Guidelines can be sought.

(m) Instructions to Lieutenant-Governors

Lieutenant-Governors are Governor-in-Council appointees and therefore technically should be subject to the Governor-in-Council Guidelines. However, the policy here is somewhat different. Since 1975, prospective Lieutenant-Governors have been asked, at the time of their appointment, to avoid holding certain offices and engaging in some activities.

When a Lieutenant-Governor is appointed, the Assistant Deputy Registrar General communicates with the designated appointee to inform him or her of the three main conflict of

interest principles to which they are expected to adhere: Lieutenant-Governors may not retain or accept directorships in profit-oriented companies, engage in the practice of a profession, or engage in the active management of a business. They are also asked to be sensitive to prevent any conflict from arising.

(n) Public Servants' Guidelines

The Public Servants' Conflict of Interest Guidelines apply to all public servants, to full-time Governor-in-Council appointees (as explained above in section (k) of this chapter), and to those members of a minister's exempt staff who have not been designated as subject to the Ministers' Guidelines.

The Public Servants' Guidelines establish seven rules which can be summarized as follows: (1) individuals must act in a manner that will bear the closest public scrutiny; they must not place themselves in a position where they are under obligation to anyone who may benefit from or seek preferential treatment and, they should not have any pecuniary interest which could conflict with the discharge of their official duties; (2) conflicts should not exist in fact or in appearance between a public servant's official duties and his or her private interests. Arrangements to avoid conflicts are to be made on appointment; (3) public servants should not benefit or appear to benefit from the use of official information which is not available to the general public; (4) they must not place themselves in positions where they could gain any direct or indirect benefit from government contracts; (5) all business and financial interests which are or could be a source of conflict must be disclosed to the individual's superior; (6) outside employment may not be held if it places on the public servant demands inconsistent with his or her official duties; and (7) preferential treatment may not be accorded to relatives, friends or organizations with which they or their relatives or friends are associated.

There are, in addition, Post-Employment Guidelines for Public Servants. These guidelines consist of a policy statement and five appendices. The policy states that the purpose of the guidelines is to give a degree of certainty to the activities of employees during and after their employment with the government.

Appendix I, "Principles Regarding the Activities of Holders of Public Office," requires that current and former holders of public office ensure by their behaviour that no one is given reason to believe that they are giving preferential treatment to anyone; ensure by their behaviour that there is no reason to believe that they have privileged access to government personnel or services; and take care not to benefit or to appear to benefit from the use of confidential information.

Appendix II, "Guidelines for Holders of Public Office During their Employment with the Government," states that public office holders must disclose to their superiors any offers of employment that could conflict with their official duties; offers under serious consideration from private sector organizations with which he or she has had official dealings; and offers that have actually been accepted. They are directed to take care to ensure that in seeking or preparing for outside employment, they do not create actual or potential conflicts and do not engage in commercial negotiations with other government employees without the permission of their superiors. Once they leave the employ of the government, former office holders must ensure that there is no appearance of improper influence, privileged access or preferential treatment.

Appendix III, "Guidelines Applying to Employment and Commercial Activities of Former Holders of Public Office," specifies those activities in which a former office holder may not engage for a certain time after leaving the government. A former office holder must not within the relevant time period accept an appointment to a board of directors of a company which was in a special relationship with the department or agency where he or she was previously employed; switch sides to act for a company in relation to any matter to which the government is a party and in which he or she had personal and substantial involvement; or lobby any department or agency where he or she was employed or with which he or she had a direct and substantial relationship. The time frame is two years for ministers, deputy ministers, heads of agencies and ministers' exempt staff at the deputy head level. It is one year for parliamentary secretaries, full-time Governor-in-Council appointees, ministers' exempt staff and public servants at or above the Executive one level.

Furthermore, former public office holders must not within the same relevant time period which is, in this case, one year for the first group and six months for parliamentary secretaries, full-time Governor-in-Council appointees, and ministers' exempt staff and public servants at or above the Executive one level--do any of the following: accept employment with a company with which they had significant direct official dealings; switch sides in connection with any matter which was under their authority; or give counsel for commercial purposes on the programs or policies of the department or agency with which they were employed or had a significant relationship.

Appendix IV, "Administrative Arrangements," outlines the purpose and composition of the committees formed to deal with the application of the post-employment guidelines in specific instances. These committees may recommend exemptions from the guidelines. There are three such advisory committees--one for ministers and parliamentary secretaries; one for

Governor-in-Council appointees and ministers' exempt staff; and one for public servants.

Appendix V, "Rules of Practice for Hiring of Former Public Servants by the Government," states two basic rules. First, persons are not eligible for certain government appointments if they lobby for clients or give counsel for commercial purposes about government activities. Second, the approval of the minister involved and the Treasury Board, as may be appropriate, must be sought for contracts of \$2,000 or more to former Governor-in-Council appointees and public servants who are in receipt of a government pension.

(o) Supplemental Guidelines for Departments, Boards, Commissions and Agencies

In part (d) of this chapter, reference was made to prohibited interests and conflict of interest provisions contained in specific statutes. These are laws. Serving a similar purpose, but not always with the force of law, are the supplemental guidelines for departments, boards, commissions and agencies.

In 1973, when the general Public Servants' Guidelines were promulgated, Treasury Board invited departments and agencies of the federal government to devise additional or supplementary guidelines where necessary due to the special or particular requirements of the department or agency. As a result, 80 such supplemental codes have been developed. Copies of these codes have been placed with the Library of Parliament and the Assistant Deputy Registrar General and some of their provisions are discussed elsewhere in this report.

(p) Contractual Terms and Conditions and Provisions of Collective Agreements

When individuals are appointed to the public service, a contract of employment is in most cases entered into. The form and nature of these contracts varies, but typically provisions are included which pertain (to a greater or lesser degree) to conflict of interest matters. In a letter contract, the terms and conditions are accepted by the offeree simply by signing and dating the duplicate copy of the letter. A copy of the guidelines is not necessarily provided nor is it insisted that the new employee signify that he or she has read and understood the terms and conditions of the guidelines and is prepared to comply with them.

As casual as this approach may appear, a number of departments do not make mention of the guidelines at all at the stage of recruiting new employees or signing employment contracts with them. Nevertheless, in a number of instances legally binding

contracts exist which incorporate conflict of interest guidelines.

(q) Oaths or Affirmations of Office

On appointment to office, ministers are required to take, first, an oath or affirmation of allegiance, in which they swear or affirm to be faithful and bear true allegiance to the Queen; second, the oath or affirmation of the Members of the Privy Council, by which they swear or affirm to keep the confidences of the Privy Council, to speak their minds openly within the Privy Council, and to be diligent, vigilant and circumspect in all dealings with Her Majesty's affairs; and third, an oath or affirmation of office, by which they swear or affirm to fulfil their duties to the best of their skill and power.

On appointment from outside the Public Service, public servants and deputy heads are required pursuant to section 23 of the Public Service Employment Act, to take an oath or affirmation of allegiance and a separate oath or affirmation of office and secrecy. These oaths or affirmations are not the same as those required of members of the Privy Council.

OATH OR AFFIRMATION OF ALLEGIANCE

I, _____
do swear that I will be faithful and
bear true allegiance to Her Majesty Queen
Elizabeth the Second, her heirs and
successors according to law. (So Help Me God).

OATH OR AFFIRMATION OF OFFICE AND SECRECY

I, _____
solemnly and sincerely swear (or affirm)
that I will faithfully and honestly fulfill
the duties that devolve upon me by reason
of my employment in the Public Service and
that I will not, without due authority in
that behalf, disclose or make known any
matter that comes to my knowledge by reason
of such employment. (So Help Me God).

The oath or affirmation of office and secrecy was enacted by Parliament as Schedule III of the Public Service Employment Act.

In addition to this general requirement for deputy heads, many Governor-in-Council appointees, for example, the Commissioners of the Public Service Commission, are required to subscribe to oaths or affirmations specific to their office.

These oaths or affirmations usually are contained in departmental acts or enabling legislation.

Governor-in-Council appointees do not, as a matter of course, take an oath or affirmation on appointment. If Governor-in-Council appointees do take an oath, it is administered by or at the department or agency to which they are appointed.

Parliamentary secretaries do not take a special oath or affirmation for that particular office. They are still bound, however, by the Oath of Allegiance (or the affirmation in lieu of the oath) which they took upon election as members of the House of Commons.

Ministers' exempt staff are not specifically required to take any oath or affirmation on appointment. Although a minister may request his or her staff to take an oath or affirmation of office or secrecy, there is no routine procedure in this regard.

There is some question as to whether the oaths taken or affirmations given are actually binding in law or only in morals, a matter which is examined in Chapter 11, "Particular Issues and Considerations."

CHAPTER 9

CRITIQUE OF THE PRESENT
FEDERAL CONFLICT OF INTEREST
LAWS AND GUIDELINES

(a) Introduction

In response to an invitation to comment on the present guidelines, many criticisms were received including a number we consider serious and valid. It is significant, however, that no one who made representations disputed the need for written rules and most said that the present guidelines, with all their faults, are based on sound and reasonable principles.

(b) Principal Criticisms and Comments

The major criticisms follow together with our comments.

1. The scope of the guidelines relating to Governor-in-Council appointees is uncertain and too sweeping

The Post-Employment Guidelines provide the following definition:

"Governor-in-Council appointees" denotes persons appointed by or with the approval of the Governor-in-Council or a minister, or in receipt of remuneration fixed by the Governor-in-Council who are in full-time positions with government departments, Crown corporations and autonomous agencies, but not those persons who are members of bodies with primarily judicial or quasi-judicial functions.

All these appointees - and, as noted below, we are uncertain as to how many there are, who they are and what they do - are treated alike in the present guidelines: For example, the rules about divestment are the same for all appointees. This may be a simple method for dealing with a complex problem but is neither fair nor reasonable. That is why we recommend a

functional approach whereby the investment restrictions are related to the nature of the duties and responsibilities of the appointee.

The consequence of the across-the-board approach of the guidelines is illustrated in the appointment of ambassadors, high commissioners and consuls general (heads of post) by the Governor-in-Council and the requirement, as a result, that they divest themselves of investments in the same manner as deputy ministers. The large majority of appointments of heads of post are made from the ranks of the career foreign service, and particularly from the group of officers in the Department of External Affairs (public servants) who are rotational as a condition of employment and are redeployed according to foreign service assignment policy and procedures. For them, appointment as a head of post is part of a career structure that includes assignments at headquarters and abroad. Appointments are also made of other departmental employees and of public servants from other domestic departments and agencies, particularly those having international programs; on completion of their assignments as heads of post, they normally return to their previous or similar positions.

There is a basic inequity in applying Governor-in-Council Guidelines to public servants on assignment as heads of post, when they are not applied to public servants holding positions of equal or greater responsibility in Canada. The possibility of actual or potential conflict of interest is at least as great for domestic employees of equivalent rank and responsibility who are involved in policy decisions that could have immediate and direct commercial consequences (in the fields of regional grants, energy development, or mineral production, for example) or who have administrative functions such as procurement for the government, hiring of employees, allocation of grants and the awarding of contracts; these employees are not subject to the guidelines for Governor-in-Council appointees to which heads of post must adhere.

The process of complying with the guidelines is sometimes difficult because the heads of post, unlike other Governor-in-Council appointees, are assuming positions outside of Canada. Arrangements occasionally have to be completed while individuals concerned are in the final stages of moving to their post, or while they are actually on post. Consequently, they become involved in extensive correspondence with the Assistant Deputy Registrar General's Office, trust companies, lawyers, investment counsellors, stockbrokers and other intermediaries and, at times with emotional ramifications, with interested family members. At the end of a posting abroad, if they wish to hold their assets directly, they must then go through the reverse process of disengagement from such arrangements which are not necessarily required for a headquarters assignment.

An element of frustration exists within this group because of the relative modesty of the assets involved, often including a residence in Canada which inevitably has to be rented during the absence of the owner, or stocks inherited from within the family, which have more sentimental than commercial value. Since the distance of the post from Canada, generally, reduces rather than increases the likelihood of a head of post having access to inside information, career heads of post also find it anomalous and discriminatory to be subject to stricter guidelines and constraints than officials to whom they report in departmental headquarters.

The responsibilities and functions of heads of post differ greatly from deputy heads of departments and agencies so there is no reason why they should be subject to the same strict guidelines. We believe it would be more appropriate that they be treated as other public servants under the jurisdiction of the Under-Secretary of State for External Affairs.

Our attention was drawn to the case of an Executive Director of the Standards Council of Canada who, after appointment and much to his surprise and dismay, was required to follow the full divestment rules although there was little, if any, discernible conflict between his public duties and his private interests. We believe, on the basis of the submissions made to us, that there are others like him among Governor-in-Council appointees.

The present structure of guidelines produces inconsistencies and unfairness, simply because, on the one hand, Governor-in-Council appointees are subject to the most rigorous uniform investment rules, whereas other public servants are subject to a régime that permits the exercise of judgement on the part of the head of the department or agency. Our Task Force learned, for example, of public servants at the level of assistant deputy minister, who were not required to divest but who supervised the activities of heads of agencies who had been appointed by Governor-in-Council and had therefore been required to follow the divestment rules. Technically, the heads of agencies report to the minister but, as the members of the Task Force know, for administrative reasons, the minister sometimes has to delegate his responsibilities down the line.

One of the problems encountered was uncertainty as to who is subject to the Governor-in-Council guidelines, notwithstanding the definition cited above. Deputy ministers are covered and so are full-time heads of Crown corporations and agencies except persons who are members of bodies with primarily judicial or quasi-judicial functions. However, there are some differences of opinion within the government itself as to how to define bodies with primarily judicial or quasi-judicial

functions. Apart from that, we did not have a complete list of full-time heads of Crown corporations and agencies appointed by the Governor-in-Council or by ministers, which, we were informed, number slightly more than 100. This lack of certainty, however, has not affected the nature of the recommendations we make. Indeed, the numbers involved in Governor-in-Council and ministerial appointments emphasize the importance of adapting the procedures to minimize conflict of interest on a functional basis to the nature of the duties and responsibilities of the various appointees.

2. Inconsistency in the content and administration of departmental and agency guidelines

While guidelines for Governor-in-Council appointees were criticized for being too sweeping, the departmental guidelines were criticized for being inconsistent both in content and administration. Discretion as to what measures should be taken by their employees to minimize conflict of interest is vested in the deputy minister or head of agency. This is desirable in order to fit with the diversity of the duties and responsibilities of the various departments. For example, the divestment rules applicable to an assistant deputy minister in the Department of Finance could be different from those applicable to an assistant deputy minister in the Department of Agriculture. There is evidence, however, that so much depends upon the individual attitudes of deputy ministers and heads of agencies towards conflict of interest problems that there is a marked inconsistency in application and some inconsistency in content of departmental or agency guidelines. All officials are expected to behave in a manner so scrupulous as to bear the closest scrutiny. Yet some are scrutinized and some are not.

The creation of an Office of Public Sector Ethics, one of whose tasks would be to advise deputy ministers and heads of agencies in the preparation and administration of departmental or agency codes of ethics, would help to promote consistency and fairness.

3. Application of the guidelines for Governor-in-Council appointees to executives of Crown corporations affects their competitiveness

Two general points were made. The first was that whatever restrictions are applied should relate on a functional basis to the activities of the Crown corporation to which the person is appointed and should not lump them all together as to divestment of securities they hold. What is appropriate by way of divestment to minimize conflicts of interest for the Chairman of the Canada Mortgage and Housing Corporation is not the same as for the President of Air Canada. The second point was that by

preventing such executives from joining the boards of directors of other corporations and by implication imposing similar restrictions on other officers, the guidelines put Crown corporations at a disadvantage in the market place with their private competitors who are not subject to such restrictions. These issues are discussed and recommendations are made in Chapter 17.

4. Absence of discretionary power in administration of the guidelines

Perhaps one of the most serious problems with the current conflict of interest and post-employment structure in general is the absence of built-in flexibility in applying the guidelines in special situations. We mentioned earlier the case of the employee who was forced to place in trust 10 shares of Bell Canada given to her by her grandmother so that she would be in absolute compliance with the guidelines.

It appears that, because of this lack of flexibility, including the lack of some kind of de minimis rule, those who administer them are forced to apply them to the letter rather than in the spirit of the guidelines as intended, causing, in many cases, considerable extra administrative burden. One former official who appeared before the Task Force submitted his personal disclosure file which had been maintained by the Assistant Deputy Registrar General during the time he was a Governor-in-Council appointee. He had been given his closed file on his retirement and was shocked to see the amount of correspondence which transpired to deal with relatively minor holdings. He observed, however, that perhaps that office did not have any latitude to judge the degree to which individuals were or were not conforming to the intent of the guidelines as against the technical detail of the guidelines.

Advisory committees on post-employment have been established to interpret the guidelines and to advise on cases that come before them. The committee system was designed to assure the public that the advisability of a public office holder engaging in certain activities had been considered in detail. It was originally considered that these roles for the committees would allow them to interpret the guidelines more liberally than the office holder might feel able to do on his or her own initiative. Also, it was considered that such a system would provide greater protection for a public office holder, who had sought and followed the committee's advice, against any future allegations of improper behaviour. The committees are authorized to recommend exemptions from the guidelines in any case where fairness to individuals or public interest requires. The record indicates that these committees have rarely met, and that only a few exemptions have ever been requested.

There would be an understandable reluctance on the part of the individual to seek the advice of a committee regarding prospective future employment - especially if it were feared that the committee would advise against it. In certain cases, it would be in the greater public interest to encourage the use in the private sector of knowledge and experience gained while in the public sector, particularly in its relationship to government. The appearance of conflict in such a situation, however, would discourage many individuals even if there were no real conflict.

The post-employment cooling-off periods, when interpreted literally, are very restrictive in terms of permissible post-employment activity. Individuals whose line of work is highly specialized could experience difficulty in finding employment after their government service. There are often cases where the waiving or reduction of a cooling-off period would be appropriate. Such a mechanism does not exist at this time unless the appropriate advisory committee makes a recommendation for an exemption to the designated individual. We believe an Ethics Counsellor of the type proposed could exercise some, although limited, discretion in such cases.

5. Shortcomings of Trust Arrangements

We expected to hear objections to the requirements imposed on ministers and Governor-in-Council appointees by the guidelines to divest themselves of certain investments by putting them into trusts. We did hear these objections and it is important to record in this report the depth of the dissatisfaction expressed by some of those subject to the current guidelines.

Some objected in principle on the grounds that the requirement to divest amounts to an expression of lack of confidence in the integrity of office holders. Some objected because, in their opinion, trustees of blind trusts mismanaged their portfolios, resulting in serious financial losses for them and their families, which they considered grossly unfair.

Although we can see no feasible alternative to trusts as a means of temporary divestment of assets that could involve conflicts between public duties and private interests, (except to a limited extent, disclosure) the general public should be aware that trusts are at best an imperfect instrument, the administration of which can and does result in unfair sacrifices for those who decide to enter public service, elected or appointed. It is all the more important, therefore, to assure that the requirements to divest are really necessary to minimize conflicts of interest and that there is as much flexibility in administration as is consistent with the spirit of the rules.

We heard complaints about the costs of establishing blind trusts. In certain cases, the annual trustee fee and expenses for managing and administering a trust were higher than the annual income of the trust. Although some relief has recently been given by the government in the form of financial assistance, the basic problem remains for those who have small holdings of shares, which is another reason for our support of a de minimis rule and for the re-establishment of frozen trusts as an option for ministers.

6. Relation between guidelines on conflict of interest and the Criminal Code

We received submissions from one public service union expressing concern about the nature of certain Criminal Code provisions as they pertain to public servants.

There may indeed be problems as to how the provisions of the Criminal Code mesh with the guidelines, particularly some of the detailed provisions in some of the supplemental codes and in some of the legislation. We do not recommend any changes in the Criminal Code but rather favour clarification of the principles and rules governing non-criminal conflict of interest situations, so that the relationship between the criminal and the non-criminal provisions can be more clearly seen, applied and understood.

7. Disclosure

Current guidelines for Governor-in-Council appointees offer the option of public declaration of certain kinds of holdings on a very limited and restricted basis in stating that, "the use of this option is not to extend to stock or securities traded on public exchanges -- and must not extend to property the management of which could conceivably put an official in a conflict of interest situation." Current guidelines for ministers give them a similar restricted option although the definitions are somewhat different.

We received representations that public disclosure should be available on a wider basis as an alternative to divestment for both ministers and Governor-in-Council appointees. In Chapter 6, this possibility is discussed.

8. Post-Employment Guidelines

Nearly all of those who made representations to us personally or in writing were critical of some aspects of the rules applying to former office holders, including:

(i) Enforceability

The guidelines are not law. While current office holders can be disciplined administratively for breaches of the guidelines, former office holders cannot be. The result is that while public spirited and conscientious former office holders feel obliged to follow the guidelines, those who are less public spirited and less conscientious or simply disagree with the guidelines feel no obligation to do so.

(ii) Ambiguity

Even those who try to observe the guidelines are uncertain as to what they mean. For example, what does "lobbying" mean?

(iii) Length of cooling-off period

There was general criticism that the "cooling-off" periods in the post-employment guidelines for ministers, parliamentary secretaries and public servants were too long. The two year limitation, applying to acceptance of directorships and "lobbying" by former ministers, deputy ministers, heads of agencies and exempt staff was criticized in particular as excessive, having in mind the short "shelf-life" in modern life of confidential information obtained while in office. The cooling-off period for parliamentary secretaries and public servants in this regard is one year.

(iv) Current Post-Employment Guidelines are counter-productive

It was represented to us that the public interest benefits from the movement of people from business to government and vice versa and that some of the restrictions in the current post-employment guidelines unnecessarily hamper that movement.

(v) Former ministers and former public servants should not be treated alike

Former ministers face problems different from former public servants when they seek employment in the commercial world. Seldom do ministers with business backgrounds resign voluntarily in order to take private employment. A high proportion of them, in one way or another, are forced out of office and have to look for a job, a fact which is not recognized in the current post-employment guidelines, which apply the same rules to both former ministers and former public servants.

- (vi) Post-employment problems exist among public servants below the rank of deputy minister that are not being dealt with adequately under the current guidelines

The view was expressed to us that in some departments it was not uncommon for middle rank public servants to retire from the public service to take employment in companies with which they had dealt in an official capacity. It was not in our mandate to investigate allegations of this kind and we did not do so. They serve to underline the point that whatever rules prevail should apply throughout the system on a consistent basis at all levels of responsibility.

- (vii) Hiring of former public servants by the government

Appendix V of one of the current guidelines (reproduced in Schedule D) contains in paragraph 2 an administrative ruling about hiring former public servants that has nothing to do with conflict of interest.

CHAPTER 10

APPROACHES TO STANDARDS OF ETHICAL CONDUCT ELSEWHERE

(a) Introduction

Your terms of reference to us, Prime Minister, asked that we review available information with respect to experience in the area of conduct in other political jurisdictions, both domestic and international, and in the private sector.

We have reviewed in some detail the current provisions governing conflict of interest matters at the provincial, territorial and municipal levels in Canada, and have looked at how Canadian professional organizations and businesses approach the topic of ethical conduct by their members and employees. We have also studied the United States experience, both at the federal level and in a number of states. Looking abroad, we have considered the situation in other Commonwealth countries, including the United Kingdom, Australia and New Zealand.

The approaches taken to conflict of interest and standard of conduct matters by other governments vary considerably one from another. This chapter provides a resumé of some of their provisions and approaches in order to present an understanding of the methods employed elsewhere. Specific concepts or solutions in other jurisdictions are considered at several points in this report.

(b) Provincial Experience

The provisions of the Criminal Code, discussed earlier in the context of federal conflict of interest laws, apply in all provinces and territories, and thus represent the same starting point as at the federal level, by providing a bedrock on which other rules with respect to ethical conduct were added.

Several general observations can be made. For the most part, the disclosure required by ministers and members at the provincial level is a public form of disclosure (made through the Clerk of the Legislative Assembly), whereas for public employees, disclosure is on a confidential basis. Deputy ministers are often covered by the same legislation which governs ministers. In some

provinces, disclosure by public office holders of assets (particularly land) is restricted to assets in the province while other provinces make no such distinction. The situation vis-à-vis Crown corporations varies from province to province, with some applying the same rules to Crown corporations as to the public service, others not. The experience of each is considered in turn.

British Columbia

The Constitution Act, the Financial Disclosure Act (1974) and the Public Service Act are the three principal governing statutes. A number of provisions pertain to members of the British Columbia Legislative Assembly, as well as to Cabinet ministers. As in the treatment of federal Cabinet members and parliamentary secretaries, we take note of the provisions which apply to private members of the legislature, since these provide a basic set of rules with which those elevated to the Cabinet must already comply.

Under the Constitution Act, no member of the Legislative Assembly is entitled to accept from the Crown in right of the province money for the supply to the province of any goods, service or work, or money from an office or employment which is appointed by the Crown in right of the province. These rules, contained in sections 26 and 33, have exceptions for incidental matters, mostly in the nature of payments through a program of general application for which a member, entitled by virtue of being part of a larger group, qualifies.

Sections 26 and 33 of the Constitution Act also stipulate (again with specific exceptions) that no member of the Legislative Assembly (MLA) may be a director or senior officer, as defined in the Company Act, of a corporation, or a person to whom, as a shareholder, section 5(1) of the Financial Disclosure Act applies. The penalty for contravening these provisions of the Constitution Act is disqualification as an MLA and the Act states that an MLA will be disqualified if, among other reasons, he becomes bankrupt, an insolvent debtor or public defaulter, or is convicted of "any infamous crime".

Under the Financial Disclosure Act of 1974 a person who accepts a nomination for election to office as a provincial or municipal official (which includes a minister or member of the Legislative Assembly) must make written disclosure. Such an official, as well as provincial public employees and municipal employees, must make a written disclosure twice a year. A person ceasing to hold office must file a written disclosure within 15 days following departure from office. The "disclosure" pertains to: (1) names of corporations in which the official or public

employee holds one or more shares; (2) the name of each business in British Columbia where the official or employee receives remuneration for services performed as employee, owner, trustee, and so forth; (3) the names of creditors; and (4) land situated in the province in which the official or public employee has an interest. If a provincial official or public employee holds more than 30 per cent of the votes for election of directors to a corporation (including joint holdings with a spouse, child, brother, sister, mother or father), section 5 of the Act requires that considerable additional information be disclosed.

Disclosure by provincial and municipal elected officials is public disclosure, made through a disclosure clerk. Failure to make written disclosure renders the violator liable to a fine of not more than \$10,000. The Supreme Court of British Columbia may, if it finds wilful contravention of the Financial Disclosure Act, order the contravenor to pay to the employer (the Government of British Columbia or the local government) the amount of the financial gain. With respect to public servants in British Columbia, it should be noted that the Financial Disclosure Act, discussed above, also applies to designated public employees although we understand that none has yet been designated. The Public Service Act itself has several sections pertaining to conflict of interest matters under the statute. For example, an employee is prohibited from engaging in remunerative employment with another employer, or from carrying on a business, except with the Public Service Commission's approval. A deputy minister may act as a director or officer of a Crown corporation if appointed to the position by the Lieutenant-Governor in Council, but is prohibited from accepting remuneration from such a position.

In cases where the Financial Disclosure Act would cover municipal employees, public employees (including those on boards, agencies or commissions under the Public Service Act for persons appointed by the Lieutenant-Governor in Council) full but not public disclosure has to be made, but not public disclosure. However, the Supreme Court of British Columbia may make disclosed information public if proceedings are engaged in against a public or municipal employee for contravention of the Financial Disclosure Act. Various ministries are drawing up conflict of interest guidelines, which must be approved by the Public Service Commission.

Alberta

The Province of Alberta has statutes and a Code of Conduct to deal with conflict of interest matters. The Legislative Assembly Act (1983) deals with conflict of interest most comprehensively, providing for disqualification of a member if he or she, or a person directly associated with him or her,

becomes a party to certain types of contracts with the government, including, subject to limited exceptions, the sale of land to the government. The acceptance of public money by the MLA or a person associated with him or her also entails disqualification.

Members of the Legislative Assembly may seek advice and direction, ex parte, from a court, concerning contracts. Each member is required to file a disclosure statement, indicating the name and address of each person with whom he or she is directly associated, and with whom he or she has been directly associated but with whom he or she has ceased to associate. The Provincial Treasurer of Alberta must file an annual report with the Assembly, making it a public document, showing the names of members of the Legislative Assembly, the persons directly associated with them, and information on payments to the ministers and those directly associated with them.

Under the Act, an MLA may place his or her holdings in a blind trust. Members may not own, directly or indirectly, shares in any public company whose business might be materially affected by the Government of Alberta (a rule derived from the Premier's 1973 policy statement, discussed below).

Cabinet ministers in Alberta must file (and update) a statement with the Clerk of the Assembly (which again makes it a public document), giving a legal description of all land in Alberta, including mineral rights in which they or their families have an interest. Statements must also list the names of private companies in Alberta in which the minister, or his or her family, has an interest, and a description of proprietorships and partnerships in which the minister, or his or her family, has an interest must be disclosed. Although there is no definition of "family" in the Legislative Assembly Act, the Premier's policy statement defines family as "minister's spouse and minor children".

The subject of conflict of interest of public servants is dealt with principally in "The Code of Conduct and Ethics for the Public Service of Alberta". This Code applies to all public service employees, including persons hired on a contractual basis under the Public Service Act. The Code expressly permits employees to take supplementary employment, except in cases where it "causes an actual or apparent conflict of interest". Employees have the duty imposed upon them to notify the employer when a conflict of interest might arise. Employees are directed not to accept money or payment in addition to their normal emoluments for public service duties.

An employee must disclose the business or financial interests of himself, his spouse and children under 18 years of

age, where these interests are affected or appear to be affected by the employee's actions and duties as a public service employee. In the case of actual or potential conflict, the business or financial interests may, with the approval of the deputy head, be placed in a blind trust. No employee involved in the sale or purchase of assets for the Crown may acquire or sell such assets without approval. There are no express post-employment restrictions.

Saskatchewan

The Members of the Legislative Assembly Conflict of Interest Act (1980) is oriented towards government contracts, sale or disposition of land and the lending of money to or from the Crown. The Act states that no Member of the Legislative Assembly (MLA) can participate in a government contract. This precludes an MLA from being beneficially interested in, or a shareholder, partner, director, manager or other officer of a business (or its subsidiary) which has a beneficial interest in a government contract. There are a number of specific exceptions, such as the right to hold certain licences and permits (e.g. to cut hay and timber or to practice veterinary medicine).

MLAs are required to disclose to the Clerk of the Assembly under oath, annually, the nature and extent of any participation in any government contract by the member or any person in his or her family. "Family" is defined as "spouse and any dependent children". Members must also disclose: the name of any business or person that was indebted to the member or his or her family in an amount exceeding \$5,000; any right, title or interest in real property within or outside Saskatchewan owned by the member and his or her family; the name of the member or any person in his or her family who was a shareholder, partner, director, manager or other officer of or held an interest in a business beneficially interested in a government contract; and details of subsidies from the Crown. There are some exceptions provided in the Act.

Provision is made in the Act for a fine of not more than \$10,000 for contravention of any of its provisions. Failure, on conviction, to cease or remedy the omission entails liability up to a further \$10,000 for each day the offence continues. Conviction also brings disqualification of the member. There is no post-parliamentary provision in the Act.

The Public Service Act, by section 51, prohibits an employee from engaging in or undertaking any business or private practice of any profession or trade, whether as principal or agent. There is provision for a fine not exceeding \$200 or imprisonment not exceeding three months, or both, for violation of the Act.

The oath of office, dealt with in section 19 of the Act, is to the effect that the employee will not ask for or receive money, services, recompense, or things in return for the discharge of duties, except his salary from the government; nor will he disclose confidential information.

Also relevant to public servants are the Saskatchewan Public Employees Conflict of Interest Guidelines defining conflict of interest as any situation which could result in either an interference with the objective exercise of his or her duties, or a gain or an advantage by virtue of his or her position in the public service. The Guidelines (in addition to the oath of office) also proscribe the acceptance of gifts.

A public service employee must disclose financial assets or investments directly or indirectly connected to the content of the employee's work. The employee must arrange his or her private and financial affairs to avoid conflict or appearance of conflict and must inform the employer when he or she perceives a conflict or the possibility of one. Assets of one's spouse and immediate family must be disclosed where conflict or appearance of it might exist.

The employer, by the same token, can demand full disclosure from a public employee when the former perceives the possibility of conflict of interest. Employees who exercise regulatory, inspection or discretionary control must not give preferential treatment to family, friends or organizations with which the employee is associated.

The Guidelines are concerned with the activities (financial and business) of the spouse of the employee and his or her immediate family. However, subsection E2 of the Guidelines goes beyond this, and gives discretion to the employer to determine if a conflict exists as a result of the interaction of an employee with a "family member" (because family ties vary from family to family). An employee may be required to divest himself or herself of financial interests or transfer such interests to a blind trust.

There is a policy statement that provides that no member of the same family may be employed in the same work unit (with certain exemptions). There is no post-employment provision in the Guidelines except, obliquely, mention of an employee's obligation to avoid being influenced by the prospect of employment elsewhere.

Manitoba

Provisions relevant to elected members in Manitoba are contained in the Legislative Assembly Act, although at the time of

writing we understand a new Bill is pending with reference to conflict of interest.

Under the Legislative Assembly Act no person holding any office, commission or employment or receiving an emolument from the Crown in right of Manitoba is eligible to be an MLA (except that a coroner and justice of the peace are not disqualified from sitting as MLAs). No person is eligible to be an MLA if he or she, directly or indirectly, holds or undertakes a contract with the province. However, section 19 of the Act provides a long list of exceptions. A person who is disqualified by virtue of prohibitions in the Act is liable to a fine of \$200 per day while sitting as an MLA.

The Assembly itself may determine imprisonment for breach of section 42 (e.g., taking a bribe). No MLA may receive, or agree to receive, any compensation, directly or indirectly, for services in relation to a matter before the Assembly. If he does, he is liable to a fine of \$500.

No barrister, solicitor or attorney, who is a partner of an MLA, shall accept or receive, directly or indirectly, any fee, compensation or reward in relation to a matter before the Assembly. To do so would bring a fine of \$500.

The Act contains no reference to an MLA's spouse or minor children, no reference to disclosure or divestment, and no post-parliamentary restrictions.

At the public service level in Manitoba, conflict of interest is addressed by the oath of office. The oath of office states that the employee will not ask for or receive money, services, recompense, or matter or things whatsoever except lawful salary, and that he or she will not disclose confidential information.

Conflict of Interest Guidelines have been drafted by the provincial government and submitted to the public service bargaining agents who had not, as of the time of writing, signified their agreement.

The draft Guidelines are extremely simple and may be augmented by specific provisions for any department. They provide that employees may not engage, directly or indirectly, in personal business transactions for profit which accrues from their official position or is based on confidential information. Employees must not act in any official matter where there is a personal interest incompatible with an unbiased judgement. There shall be no direct or indirect personal business or financial activities which are in conflict, nor shall the employee place himself or herself in a position of obligation in the discharge of

his or her official duties. Disclosure must be made in the case of actual or foreseeable potential for conflict. Employees will be advised, when they seek clarification, of any steps to be taken. The employee's spouse or immediate family are not referred to in the Guidelines. There is no post-employment provision. It would appear that the Guidelines will have application to agencies, boards and commissions, but no reference is made to Crown corporations.

Ontario

For ministers and parliamentary assistants, guidelines were introduced following a statement to the Legislature by the Premier in 1972. At the time, these Guidelines on Conflict of Interest were considered by the Premier to be "broader in scope, far more definitive and precise than any previously enunciated by any comparable jurisdiction ... in Canada or anywhere else".

Ministers and parliamentary assistants, and their spouses and minor children, are prohibited from purchasing directly or indirectly, except for personal use, land or interests in land in Ontario. No private company in which the minister or parliamentary assistant has an interest may become contractually involved with the Government of Ontario. Where a matter involving a personal beneficial interest comes before a ministry, the minister must request that a colleague be officially appointed to act for the ministry in that matter. Ministers must abstain from day-to-day participation in any business or professional activity.

Public disclosure (i.e., to the Clerk of the Legislative Assembly) must be made of properties owned by ministers or parliamentary assistants and by their spouses and minor children, whether ownership is direct or indirect. "Properties" means land, except that occupied for private residential or recreational use; all shares or debt interests in private companies and land and all partnerships or proprietorships in which they are principals.

Divestment is required with respect to share interests in public corporations, which includes the option of placing them in a blind trust. There is no post-parliamentary provision.

The guidelines for public employees were developed in 1973 and later converted into a regulation made pursuant to the Public Service Act. In a news release in 1973, the Premier said that conflict of interest was "a moral as well as a legal issue".

In addition to the Regulation, there exists an Ontario Manual of Administration which contains a policy on conflict of interest incorporating the spirit and language of the Regulation. The Regulation places the onus on the public employee to perceive, identify and disclose a possible conflict of interest in

situations where the employee might derive "a personal benefit" and "abide by the advice given". Similarly, if his or her outside activities could place him or her in a conflict situation, the employee must disclose and abide by the advice given. Contraventions can lead to dismissal. No public employee may engage in any outside work or business undertaking that interferes with his or her duties, or in which he has an advantage derived from his or her public service employment, or in which his or her (outside) work would otherwise constitute full-time employment, or in a professional capacity that will, or is likely to, influence or affect his public duties. The Premier cited examples including: ownership of land or property where an employee could influence its use or value, and interest in a company held by the employee or his or her immediate family whose dealings with the government could be influenced.

Each minister is responsible for designating particular areas of employee conflict, in the same manner. For example, the Ontario Securities Commission has developed rules concerning investments to guide its employees.

The Ontario Manual of Administration provides that an employee shall, on instruction, divest himself or herself of an outside interest or transfer such interest to a neutral third party (blind trust). "Immediate family" is not defined and no mention is made of "spouse", although one's spouse presumably is regarded as part of the immediate family.

There is no post-employment restriction per se on former public office holders, although, as noted, departments and agencies may impose their own. One commission, for example, imposed a 12-month restriction concerning appearances before the commission to represent persons dealing with it.

The Guidelines apply to Crown agencies.

Quebec

In Quebec there is a law governing conflict of interest for members of the Quebec National Assembly (La Loi sur la législature). In addition, the Premier issued, in 1981, a Directive to Ministers, Parliamentary Assistants and Public Servants concerning the acceptance of gifts.

The Act provides for the disqualification of a member of the Assembly who accepts a payment other than lawful expenses and salary and allowances. There are certain exceptions (e.g., fees received by a medical doctor for services to welfare cases, etc.). No member may be a businessman contracting with Her Majesty or with the Government of Quebec, although the member may hold shares in a corporation doing contractual business with Her

Majesty or with the Government of Quebec with the exception of a company which carries out public works projects. A member of the Assembly risks a fine of \$1,000 per day for sitting while disqualified by virtue of infraction of this Act.

In 1981, a directive was given by the Premier to all ministers, requiring them to end all professional commercial or business activity which could be a possible conflict of interest or prevent ministers from devoting all their time to their duties. Ministers are to divest themselves of their interest in companies whose shares are listed on the stock market or for which an over-the-counter market exists. Ministers must ensure that they and their immediate family holding shares in companies do not do business with or receive loans or subsidies from the Government of Quebec. Exceptionally, ministers may engage in business with the government provided there is no derogation from the directive. The Parliamentary Committee on Financial Involvements must be informed of the particulars of the details of such contracts for which an exception is sought.

Having regard to the nature of the duties of a given minister, he or she, and the minister's family may be required to divest themselves of a holding that is not otherwise forbidden. Ministers have 60 days grace if they find themselves involved in such a circumstance which occurred before becoming a minister, or if they found themselves in that circumstance because of marriage, by the application of law, or by succession. This also applies, mutatis mutandis, to the minister's immediate family.

A minister or his or her family must not purchase land for speculative purposes, or acquire an interest in property in Quebec or in a real estate development company in Quebec. There are certain exceptions permitted, such as acquisition of land for agricultural purposes. Ministers must disclose annually (including a nil report) to the Secretary-General of Cabinet (Executive Council) details of their shares and those of their spouses and minor children, financial holdings, land, property (in or outside Quebec) except residential property; the name and particulars of creditors, indicating the degree of indebtedness in some circumstances and businesses in which they have an interest. The minister's disclosure statements are available to the public.

The Premier of Quebec also issued a Directive on Gifts to Ministers, Parliamentary Assistants and Public Employees. In essence, the Directive restricts acceptance of gifts to those of "modest value" (under \$25) and where the gift is personal and was received at an event in which the person participated. All other gifts must be returned to the donor or sent, as appropriate, to the Ministry of Cultural Affairs or Public Works and Supplies.

There is no post-parliamentary restriction on ministers and parliamentary assistants in Quebec.

The Public Service Act (Loi sur la fonction publique) of Quebec deals with conflict of interest in section 99. In addition, there is a Regulation dealing with a code or standards of conduct and discipline. (Règlement sur les normes de conduite et de discipline dans la fonction publique et le relevé provisoire des fonctions.) Moreover, public employees are subject to the Premier's Directive of 1975 concerning acceptance of gifts which has the effect of modifying the Regulation. The substance of the Premier's Directive of 1976 has already been discussed above.

The Regulation affects everyone referred to in Article 72 of the Public Service Act and describes failure to conform with its provisions as a disciplinary infraction. According to the Regulation, a public employee is required to perform his or her duties with probity, in a disinterested and impartial manner. The Regulation is a "catch-all", inasmuch as it also deals with work hours, absences, being intoxicated, refusal of work or incitement to refuse work, negligence, faulty work, disobedience, and so forth.

No public employee may solicit or accept a gift (but: see the Premier's Directive of 1976 discussed above, which also applies to public employees), reward, commission, discount, loan, reduction of debt, favour or advantage, nor must he or she use, to his advantage or personal use, information deriving from his or her duties.

No public employee who is a "professional" (defined as a person in a position requiring 16 years or more of study to qualify) may exercise his or her profession except for the Government of Quebec. A public employee must disclose a situation likely to create a conflict of interest. The employer will then indicate the action the employee must take. A deputy minister must make his or her own disclosure to the Premier. An employee intending to publish anything, or to give a press interview concerning the department in which he or she works, must obtain prior authorization.

Section 99 provides that, on pain of dismissal, no employee may have a direct or indirect interest in a business activity which is in conflict with his or her official duties. Such dismissal will not occur if the interest is acquired by inheritance or unconditional gift, provided the employee divests himself or herself of it without delay. The same applies to an assignment, promotion or transfer if he or she renounces it without delay.

Disciplinary penalties for infractions are listed as reprimand, suspension or dismissal. A public employee may also be relieved temporarily of his or her duties with or without pay in the putative case of a serious infraction or criminal infraction or if an emergency situation calls for such action. However, such a temporary suspension is regarded, until clarified, as an administrative, not punitive, action. Where salary is stopped, it may later be restored retroactively. There is no mention of spouse and minor children as such. There is no post-employment restriction.

At the time of writing, legislation had been introduced in the Quebec National Assembly dealing extensively with the Quebec Public Service.

New Brunswick

The Conflict of Interest Act (1978) of New Brunswick governs the conduct of the Executive Council (ministers), deputy ministers, MLAs, heads of Crown corporations, and executive assistants to ministers.

A member of the Legislative Assembly may not hold office in or receive an emolument from the Government of New Brunswick. He or she may not hold a full-time position with the Government of Canada; be a shareholder or be involved in any contract or agreement with Her Majesty, or any public office with respect to the public service of New Brunswick under which public money is expended (with specified exceptions, such as the receipt of superannuation, Old Age Assistance, or money which is paid to the public generally or to specific classes of the public); nor may he or she be a surety or a guarantor for any person party to a contract with the Government of New Brunswick. An MLA is permitted certain defined activities and employment outside the Assembly (e.g. notary, justice of the peace, coroner, member of Her Majesty's Armed Forces, and so forth, as specified in the Act) or may accept a salary or benefit from a registered political party of which he or she is a member.

Ministers, who are subject to these restraints and prohibitions as well, may not carry on business, except as determined by a judge appointed under the Act. Nor may a minister accept fees, gifts, gratuities or other benefits which could influence his or her decisions. A minister may not be involved with any office or position where the duties could interfere with his or her ministerial duties.

Executive staff (to ministers) are governed, mutatis mutandis, by the same restraints and prohibitions as apply to MLA's and ministers. Deputy ministers and heads of corporations are governed, mutatis mutandis by the same restraints and prohibitions as apply to MLA's and ministers.

All classes of people covered by the legislation, except MLA's, may in closely defined circumstances as set out in section 6, engage in, or be associated with, certain contracts with the Government of New Brunswick notwithstanding the other provisions of the Act.

Disclosure under oath is mandatory under the Act. Such disclosure must be made to a judge of the Court of the Queen's Bench of New Brunswick and must furnish information pertaining to the involvement of the MLA, minister, deputy head, head of a Crown corporation or executive assistant, or the involvement of their spouses or dependent children with, or ownership of real and personal property, business and financial involvement (with certain exceptions) of a personal nature and property in blind trust. The judge must examine the disclosure statements and may inquire into them.

A designated judge must make a report upon the application under oath of any person that there has been non-compliance with the Act. Where a judge finds a conflict of interest he or she is required to direct the person to comply with an order to remedy the conflict (through divestment, return of a gain, resignation of employment or other means). For violations of the Act, a fine of up to \$10,000 or imprisonment for up to one year may be imposed. Also, a court may prohibit a person from holding an office or position for such period as the court prescribes. There is no post-parliamentary restriction under the Act.

With respect to the public service, it will already be noted that deputy ministers and heads of Crown corporations are governed by the Conflict of Interest Act (1978). For the public service of New Brunswick, a Conflict of Interest policy was enunciated in 1981 based on the general rule that an employee must not engage in any business or transaction of a financial or personal nature that would compromise the fair and honest discharge of the employee's official duties. Subscription to the principles of the Conflict of Interest Policy is a condition of employment. There must not be, nor appear to be, any conflict between the private interests of the employee and the employee's responsibility to the public. The policy interdicts the conferring of a benefit on the employee or relatives, friends or associates; revealing confidential information; accepting a reward, gift or favour; or using the employer's property or lands for unofficial purposes.

An employee may also be required to make sworn disclosure listing business, commercial or financial interests of the employee, spouse and dependent children, except certain personal property (such as primary residence, automobile, domestic

items, trust and bank certificates). The disclosure statement is filed with the Senior Executive Office and is kept confidential.

Public employees' duties may be such as to prohibit "outside" employment which is detrimental to the public interest. Prior approval must, therefore, be obtained before an employee considers "outside" employment.

Infractions may entail disciplinary action, including dismissal. There is no post-employment restriction. Crown corporations are governed by the policy.

Nova Scotia

For elected office holders in Nova Scotia, the House of Assembly Act provides, in section 21, that no person who holds office in the service of the Government of Canada or the Government of Nova Scotia to which any salary or wage is attached, is eligible as a member of the House of Assembly.

Section 22 of the Act stipulates that, except as otherwise provided in the Act, no person holding or enjoying, undertaking or executing, directly or indirectly, alone or with another, by himself or by the interposition of a trustee or a third person, any contract or agreement with the Government of Nova Scotia, or with any minister or department of the government, for which any public money of Nova Scotia is to be paid for any service, work, matter or thing, is eligible as a member of the House or to sit or vote therein.

As in other provinces, the general prohibitions are softened by a number of exemptions. A member of the House may, without becoming disqualified, be a member of the Armed Forces; in receipt of a pension or wartime-incurred disability allowance; a justice of the peace, stipendiary magistrate, notary public, commissioner of oaths, prosecuting officer, coroner, executor, administrator or trustee; a shareholder in an incorporated company having a contract or agreement (with the Government of Nova Scotia) except for a public work; a contractor for the loan of money to the Government of Nova Scotia, proprietor of, or otherwise interested in any newspaper in which Nova Scotia government official advertisements are placed; a surety for a public officer; a member of any medical board or commission of any hospital; a party to any contract or agreement of a casual nature for the supplying of any service or work; a temporary or part-time employee for the governments of Canada and Nova Scotia where special qualifications are required.

The penalty for sitting as a Member while disqualified is \$1,000 per day, recoverable through the Supreme Court of Nova

Scotia. Breach of (public) trust is addressed in Part III of the Act, and one is liable to five years imprisonment.

A Member is in violation of the Act if he or she accepts a bribe to influence him or her and is liable to imprisonment while the House is sitting, in addition to any other penalty to which he or she is liable under law.

No member of the House, and no barrister or solicitor in partnership with a member, shall accept or receive, directly or indirectly, any fee or reward in respect to promoting any bill or resolution to the House. The penalty for violation is \$200, in addition to the fee or reward received by him or her.

There is no provision for disclosure or divestment, no reference to spouse or immediate family, nor any post-parliamentary restriction in the House of Assembly Act.

The Public Service Act of Nova Scotia contains no reference to conflict of interest, directly or indirectly. The Civil Service Act permits, by virtue of section 35, employees who are not designated in the regulations, to be elected to municipal office or a school board, if such service does not interfere with the performance of their duties, or conflict with the interests of Her Majesty.

Prince Edward Island

The Legislative Assembly Act of Prince Edward Island provides that no person is eligible to be a member if he or she holds office (with compensation) with the Government of Canada or of Prince Edward Island. However, a member may be a public school teacher, a member of the Armed Forces, sit on (specified) hospital boards, and hold shares of any company. A member may not, directly or indirectly, hold a contract or agreement with Her Majesty where public money is paid for service or work. Nor shall he or she become surety for such contract. The penalty for doing so is disqualification as a member. If a member sits in the legislature while disqualified, he or she forfeits \$250 per day.

The Civil Service Act of Prince Edward Island does not address conflict of interest matters as such. The oath of office, however, states that the employee is not to ask for or receive money, services or recompense whatsoever, except salary by law. The government has twice endeavoured to have conflict of interest provisions written into legislation, but has not had the bill passed. A House Committee is, we are informed, examining the subject. There is no disclosure or divestment requirement, no post-employment restriction, nor any reference to a public employee's family, in the few rules which do apply. Crown

corporations do not have conflict of interest guidelines imposed by the government.

Newfoundland

Ministers in Newfoundland are governed by the Conflict of Interest (Ministers) Guidelines, 1983, made under the Conflict of Interest Act, 1973. Also governed by the Guidelines (Newfoundland Regulation 310/82) are parliamentary assistants, special assistants to the Premier, and parliamentary secretaries to ministers.

Under the Guidelines, a minister must not use his or her office to gain preferential access to benefits from government, must not own shares in a company, have an interest in a partnership or other association engaged in oil and gas exploration, engage in mineral exploration or land speculation, or conduct land speculation in his or her own name. Any such interests must be disclosed to the Premier. Disclosure applies equally to interests held by the minister's spouse or minor children.

A minister may not make personal use of privileged information. No employment, office or position may be held, including self-employment, outside a minister's duties, which conflicts with the performance of his or her ministerial duties. A minister must not allow his or her plans for future employment to influence the performance of his or her duties. A minister must disqualify himself or herself from exercising all regulatory, inspection or discretionary functions in matters involving the minister or a relative, including matters such as contracts, land grants and leases or financial assistance for commercial purposes by way of grants, loans, guarantees or subsidies. A declaration for disclosure purposes must be made by each minister of his or her active association with private interest groups, and the minister must disqualify himself or herself from participating in any government decision regarding such groups. No gift, favour or service may be accepted from persons having dealings with the Government. The Premier may, in a particular situation, take action to require a minister, his or her spouse or minor children, to divest, or place interests in an approved trust. The Guidelines apply to the minister, the spouse and minor children for one year after the minister ceases to hold office.

Under the Conflict of Interest (Public Employees) Regulations, 1982, made under the Conflict of Interest Act, disclosure is required of "business, financial or property interest of a public employee, his or her spouse and minor children and with any person within one degree of relationship by marriage, adoption or consanguinity of that public employee or of his or her spouse. A public employee shall not, without the

permission of his or her department head, participate in any official action concerning any interest disclosed or required to be disclosed."

A public employee and his or her spouse or minor children are not, while he or she is employed and for one year thereafter, eligible to hold a government contract which pertains to the department or agency with which he or she is or was last employed.

Land speculation or development, exploration for oil and gas in regulated areas and mineral exploration are interdicted.

A public employee may not use privileged information for personal reasons. Outside employment, office or position, including self-employment, is not permitted if it conflicts or causes interference with the performance of public duties. A public employee must not allow the performance of his or her official duties to be influenced by plans or offers of future employment. A public employee must disqualify himself or herself in certain circumstances from participating in a process or exercising a function where to do otherwise might be to give preferential treatment and must report this to the department head.

The department head has power to require the public employee (including spouse and minor children) to divest or to cease outside employment. The department head may also transfer the public employee, impose discipline, or recommend dismissal.

Crown corporations are subject to the Regulations.

Yukon

To date, a written code in the Yukon pertains only to members of the Executive Council (ministers). There is no statute. The "Executive Council Code of Conduct Regarding Conflict of Interest" was introduced following a statement in the Legislature by the Government Leader, Mr. Pearson, in April, 1981. Although the Code applies also to the minister's spouse and dependents living with him or her, it has no application to MLAs. The Code identifies three principal areas of concern: (1) contracts with the Yukon Government; (2) business and professional activities in the Yukon; and (3) financial interest and positions in corporations and other bodies in the Yukon. The principal objective is to enforce what the Government Leader called a "no contract" rule which prevents ministers and their families (as defined above) holding contracts with the Yukon Government, except in certain limited defined circumstances.

A minister must make annual disclosure of holdings, business and financial interests held by him or her and family, including family employment in any such enterprise. The only specific reference to divestment pertains to existing contracts with the Yukon Government still held by the minister, or his or her family, at the end of six months after the minister's appointment to the Executive Council.

No minister or member of the Assembly or his or her family, may purchase or sell land to or from the Yukon Government, except on expropriation or approval of the price by a judge of the Supreme Court.

No person in the minister's family may take a position in the minister's administration. There must be filed, annually, a statement of who in the minister's family is employed by the Yukon Government and the position held.

The minister is not prevented from engaging in "outside" employment, business or professional activity where there is no ostensible conflict and provided such "outside" involvement is not day-to-day in nature and provided it does not interfere with his or her duties. (The Government Leader's statement suggests that this exception to the general rule pertains to operation of a family business.)

The Code imposes no post-parliamentary restriction.

The Public Service in the Yukon is governed by the Government of Yukon Policy Directive, 1/39, called Public Service Conflict of Interest Guidelines (1978). Also pertinent is section 194 of the Public Service Commission Ordinance, which deals with contracts. Under the Guidelines, public servants are directed not to place themselves in a position of obligation to any person who might benefit from special treatment. They should not have a pecuniary interest that could conflict with the discharge of their official duties and no conflict should exist or appear to exist between private interests and their official duties. Upon appointment, a public servant is expected to arrange his or her private affairs to prevent conflict of interest arising. Care must be taken in managing private affairs not to benefit (or appear to benefit) from use of official information.

A public servant should not place himself or herself in a position where he or she could derive direct or indirect benefit or interest from government contracts. No public servant directly, in his or her own name or through another person "may bid upon, tender for, accept or enter into any contract with the Territory". (This section in the Guidelines is the same wording as section 194 of the Public Service Commission Ordinance.)

The holding of outside office or employment that could place on a public servant demands inconsistent with his or her duties is prohibited. No preferential treatment may be given to relatives, friends or organizations with which the public servant is associated. All business, commercial or financial interests where they might conceivably be construed as in actual or potential conflict must be disclosed as must any possible conflict of interest arising from his or her outside activities. A public servant must abide by the deputy head's advice concerning conflict of interest situations.

Deputy heads have the added responsibility for themselves to be so scrupulous in obeying the law that their actions will bear the closest public scrutiny.

There is no post-employment restriction.

Northwest Territories

The Council Ordinance (1970) in section 16.1 deals with conflict of interest.

A Member of the Territorial Council (legislature) must disclose his or her pecuniary interest, whether the interest is direct or indirect, in any matter under consideration by the Council of the Northwest Territories. Disclosure means that it is entered in the Minutes of the Council (so that it is public). Disclosure also pertains to the interests of a dependent spouse, son, daughter or other relative who has the same home. There are certain minor exceptions to disclosure.

A member is considered to have an indirect pecuniary interest in any matter in which the Council is concerned, if that member (or his or her nominee): is a shareholder, director or senior officer of a private corporation; has a controlling interest (10% of voting rights) or is a director or senior officer of a public corporation; is a member of a body having a pecuniary interest in such a matter; or is a partner or employee of a person who has a pecuniary interest.

A member guilty of contravention of section 16.1, unless through inadvertance or bona fide error, may be disqualified by a court and have imposed upon him or her a fine not exceeding \$5,000. This section makes no overt reference to divestment, but it is inherent in the language of the text. There is no post-parliamentary restriction.

Conflict of interest in the Public Service and Crown corporations is addressed in three ways by the Northwest Territories Government; section 49 of the Regulations (1967) under the Public Service Ordinance; the Conflict of Interest Directive

(Personnel Manual - 1983) and the provisions contained in two collective agreements.

The Regulations are extremely brief. The two collective agreements pertain to the Public Service Association and the Teachers' Association. The provisions of these agreements are similar in purpose and embody recognition that certain forms of "outside" employment are undesirable. Also, employees are required under each agreement to notify the employer (Government) of the nature of such outside employment.

The Conflict of Interest Directive (1983) would seem to have universal application, notwithstanding the language of the two collective agreements. The Conflict of Interest Directive is not stated to apply to an employee's family.

Under the Directive, no employee can carry on any business or employment outside the public service which would entail a conflict of interest. Nor can any employee carry on a business in which he or she exploits unduly and for personal gain his or her acquaintance with other public service employees. No employee is to request or accept a payment or benefit for functions which are part of his or her public duties.

A senior officer (defined) must covenant under the Directive that during a period of one year of post-employment he or she will not use knowledge and information obtained while a public service employee to cause loss to the Northwest Territories Government or to benefit himself or herself. The covenantor may also be enjoined (during the same year following his or her termination) from purchasing or obtaining interest in a certain business activity (specifically defined in relation to him or her). Additionally, a senior officer may be required to undertake not to operate a certain type of business or be employed in it. The Directive provides that no senior officer can be an officer or a director of a company holding a contract (involving remuneration) with Her Majesty, or with the Commissioner of the Northwest Territories.

Public service employees below senior officer level are not required to sign a covenant, and for them, therefore, no post-employment requirement exists.

(c) The Municipal Level

It is at the municipal level in Canada where by far the largest body of law and jurisprudence exists with respect to conflict of interest matters. The Municipal Acts or similar statutes in each province and in the two territories for many years have contained provisions relevant to ethical conduct on

the part of elected representatives, and recent practice is to develop rules that are also applicable to municipal employees.

Statutory provisions governing pecuniary conflict of interest problems in the case of Ontario, for example, date to the first comprehensive Municipal Act passed in 1849 (the Baldwin Act) which stipulated:

no person receiving any allowance from the Township, Country, Village, Town or City (except in the capacity of Councillor, or in capacities incident thereto), and no person having by himself or partner any interest or share in any contract with or on behalf of the Township, County, Village, Town or City in which he shall reside, shall be qualified to be, or be elected alderman or councillor for the same, or for any ward therein.

Today a number of provinces have chosen to enact separate statutes governing conflict of interest problems at the municipal government level, such as an Act to Prevent Conflict of Interest in the Conduct of Municipal Government enacted in Nova Scotia in 1982, an Act respecting Municipal Bribery and Corruption in the Province of Quebec, the Municipal Conflict of Interest Act, 1983, in Ontario, the Municipal Council Conflict of Interest Act passed in 1983 in Manitoba. In other provinces provisions dealing with the same subject are contained in the Municipal Act or some other statute.

Generally speaking, these provisions are intended to govern the conduct of members of municipal councils, requiring disclosure of conflicting interests on matters before council, and prohibiting members from speaking to or voting on such matters in which they have financial interests. In some instances, the statutes pursue the matter with considerable thoroughness, as, for example, in the Municipal Conflict of Interest Act in Ontario where "the pecuniary interests, direct or indirect, of a parent or the spouse or any child of the member shall, if known to the member, be deemed to be also the pecuniary interest of the member" and where, moreover, a spouse is defined to include a common-law relationship of five years or more duration.

In examining conflict of interest rules at the federal level, in the provinces and in the two territories, we described the rules applicable to private members of the legislative body, since such rules establish minimum standards with which ministers and parliamentary secretaries must comply. Otherwise, concern for rules governing ethical conduct of members of Parliament are

outside the terms of our mandate. At the municipal level, of course, there is no exact parallel, so we will not go into detail about the conflict of interest rules governing elected municipal representatives.

We would, however, make two observations based on our review of municipal conflict of interest provisions in Canada. First, it is apparent from the way most provincial legislatures have enacted provisions to regulate this subject, that concern for conflict of interest problems at the municipal level is profound. It seems the risk of problems arising at the municipal level is great, given the large number of highly specific matters local councils must deal with (licensing, zoning, building permits and development approvals) which can give rise to sharply focused efforts by interested parties to influence members of council. Combined with this is the fact that many local councillors come with little political experience to their task on council and may be unaware of the pitfalls to be avoided in dealing with subjectively interested parties. Another factor is that municipal elected officials in most communities have other jobs, businesses or professional associations, so that in addition to their part-time council work they have continuing interests in the business activities of their community. These factors generate a number of potential conflict of interest problems, and the provincial legislatures have seen fit to lay down a fairly specific legal framework within which elected municipal officials must conduct themselves.

Second, the existence of numerous conflict of interest laws, over many decades, has given rise to a significant body of jurisprudence. A few general principles seem appropriate to bear in mind in the context of this report and the recommendations contained in it.

The justification for the rules governing the conduct of municipal officers both at common law and under various provincial statutes, has been stated as follows: "The plain principal of justice, that no one can be a judge in his own cause, pervades every branch of the law, and is as ancient as the law itself."¹

The underlying rationale for restrictions upon eligibility for municipal office and upon participation in the affairs of municipal government while in office is that those who

1. Paley on Summary Convictions, 7th ed., p. 43 cited by C. Boyd, in Re: 1'Abbé and the Corporation of Blind River (1904) 7.O.L.R. 230 (Ont. Div. Ct.) at 231.

have a personal interest in a particular matter may be incapable of acting with complete objectivity toward that matter. In other words, there is likely to be a bias on the part of a person who, for some reason, has an interest in the outcome. A precise definition of such an interest and the extent of the restrictions imposed upon public officers is set out below.

It has been long recognized that bias in the judicial process offends principles of natural justice:

In the administration of justice, whether by a recognized legal Court, or by persons who, although not a legal public Court, are acting in a similar capacity, public policy requires that, in order that there should be no doubt about the purity of the administration, any person who is to take part in it should not be in such a position that he might be suspected of being biased.²

The same principles apply to government. The likelihood of a public official, especially in local government, being faced with a position of conflict is inherently great and unavoidable. Decisions about land use, operating licenses and road allowances are made by those who are closest to the scene. It is inevitable that local representatives will have personal interests in some matters coming before them. The potential for bias has, in many jurisdictions, been recognized by statutes whose purpose it is "to prevent the conflict between interest and duty that might otherwise inevitably arise".³

At the same time, it has been recognized that the accessibility of public office should not be unnecessarily restricted:

...(The) right of being chosen to represent his fellows in a representative body, Parliament, Legislature, municipal council, is one of the dearest possessions of a freeman, and it should not be taken away without clear statutory direction.⁴

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2. Per Lord Esher, M.R. in Allinson v. General Council of Medical Education and Registration, (1894), Q.B. 750, at 758.
 3. Nutton v. Wilson (1889), 22Q.B.D.774, at 748.
 4. Rex ex rel. Scroggie v. Robb (1925), 57 O.L.R.23, at 25.

Typically, municipal council members are required to make disclosures of their interests and refrain from participation in the consideration of matters coming before council in which their interests may be involved. The purpose of legislation in this area is to promote objective decision-making and not to ensure that representatives vote against their own interests:

The object of (the Act) is clearly to prevent councillors from voting on a matter which affect their own pockets and, therefore, may affect their judgement, and a councillor's judgment may be affected by the proposal to preserve his liability just as much as by a proposal to terminate it, particularly where other persons in a like situation are being relieved from from the same liability.⁵

It is no defence then, for a municipal councillor to assert that he was not moved by a desire to better his interests as this is not what is demanded of public officials:

It is no defence, then, for a municipal councillor to cast his vote for the question or against it. He may have voted favourably to his pecuniary interest or he may have "leaned over backward" and voted against it. The latter course may be acceptable morally, but it does not achieve the disinterested consideration of the question on its merits, which the elector is entitled to expect, and to receive, from his representatives, and which the statute commands.⁶

Similarly legislation in this area does not seek to punish the corruption of public officials, nor does its operation depend upon a finding of corruption. Rather, it seeks to guarantee openness in the conduct of municipal affairs.

5. Brown v. Director of Public Prosecutions (1956) 2All E.R. 189 (Q.B.), at 192.

6. Re. Guimond and Sornberger (1980), 115 D.L.R. (3d) 321 Alta, C.A.), at 330. See also Beaulieu v. Brisson (1948), C.S. 447; Guibord v. Dallaire (1931), 50 B.R. 440.

There is no need to find corruption on (the councillor's) part or actual loss on the part of the council or board. So long as the member fails to honour the standard of conduct prescribed by the statute, then, regardless of his good faith or the propriety of his motive, he is in contravention of the statute.⁷

There are saving provisions in many statutes relating to a "bona fide error in judgement" on the part of a councillor. This however, does not afford a blanket "good faith" defence to the requirements of such statutes.

Aside from disclosure of personal interests and restrictions upon participation in municipal affairs, some statutes also prohibit local public representatives from entering into contractual relations with the municipal corporation of which they are members. Such a contract would be inherently suspect as involving a conflict between a person's public duty and his private interest. As such, contractors with municipalities are often disqualified from holding local office.⁸

Legislation does not catch all forms of apprehended bias; neither does the common law. Frequently, public officials are elected solely because of their inclinations toward certain interests and issues. This has been recognized as an inherent feature of democracy, and beyond the reach and concern of the law:

The activities of seeking election of necessity require the aspirant to office to declare himself on issues thought to be of public interest, and indeed the forcefulness with which his views are expressed, even the narrowness of his outlook, may hold attraction for voters. This is part of the democratic process on which municipal government is founded. When elected, a failure on his part without good reason to adhere to the views and opinions he has publicly

7. Re Moll and Fisher (1979), 97 D.L.R. (3d) 506 (Ont. Div. Ct.), at 509.

8. Marcoux v. Plante, (1976) Que. Q.B. 742, a decision under the Municipal Bribery and Corruption Act R.S.Q. 1941, c. 214.

expressed may result in a feeling of distrust of him on the part of the public, even cynicism for the democratic process. These are factors which in my view are of prime importance, and must be accorded a place in judging attitudinal bias on the part of members of a municipal council.⁹

Thus, the purpose of legislation that seeks to restrict participation in municipal affairs by interested parties and to limit eligibility for local office generally, is merely to ensure that matters coming before municipal councils are given disinterested consideration on their merits. It does not attempt to prevent candidates from holding firm views on municipal issues outside of the realm of their material interests.

(d) United Kingdom

In the United Kingdom, there has generally been reliance on unwritten rules and customs to avoid conflict of interest. Members of Parliament are not extensively limited in terms of their outside employment or business interests and, in contrast with the United States, are not governed by a comprehensive code of conduct. As noted with respect to the British approach, "It is only to restrict the more odious practices that Parliament has seen fit to adopt resolutions or establish statutory rules. Even these rules are not extensive and in many cases have deliberately avoided precision".¹⁰

However, it must also be pointed out that there is a long tradition of dealing incrementally with questions of conflict of interest in the United Kingdom. For example, a House of Commons resolution of 2 May 1685 defined the acceptance of a bribe by an MP to be a "high crime and misdemeanor". Likewise, rules in regard to other forms of conflict of interest were developed over the years and have been added to British parliamentary tradition. In this regard, the English approach to conflict of interest is analogous to the common law.

9. Re. Campeau Corporation and the City of Calgary (1980), 112 D.L.R. (3d) 737 (Alta. C.A.), at 751.

10. The Honourable Allan J. MacEachen, President of the Privy Council, Members of Parliament and Conflict of Interest. (July, 1973) Ottawa, p. 10.

One of the major reasons for the difference between the approaches of the United Kingdom and the United States is the history of greater careerism both in politics and bureaucracy in the U.K. This difference has been explained in these terms:

The close links between the Government and Parliament in Britain and the doctrine of ministerial responsibility to Parliament has developed a tendency for political Ministers also to be career politicians. Unlike the United States practice, they are not usually men secured from business or industry, for example, to join an administration for the duration of its existence with the intention of returning to their extra-governmental interests at the end of the administration's tenure of office.

The insulation of the career politician in Britain, however, is less than complete because members of Parliament themselves are expected to carry on extra-parliamentary careers to supplement their incomes.¹¹

A somewhat similar situation exists with regard to the British Civil Service in that reliance has not been placed on a comprehensive code of conduct; but rather faith has been placed in self-discipline on the part of the bureaucracy.

While British practice relies on legislation dating back to the turn of the century, for the most part the conduct and discipline of the civil servant in Britain is laid down in regulations made by the Treasury Department. These regulations have been devised and are administered by the Civil Service itself.¹²

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11. Research Branch, Library of Parliament, Ottawa (February 13, 1981) Conflict of Interest Regulations in the United States, United Kingdom and Canada, pp. 16-17.
 12. G.P. Wilson, "Conflicts of Interest in Public Law in England", Proceedings of the 6th International Symposium on Comparative Law held in Ottawa, August 28-30, 1968, Faculty of Law, University of Ottawa, University of Ottawa Press, Ottawa, 1969. pp. 318-9. Referred to in ibid., p. 27.

The general principles of the conduct of British civil servants stem from a study in 1928. This enquiry advocates the view that the Civil Service can and should discipline itself. Paragraph 55 of the enquiry's report states that:

...the Civil Service, like every other profession, had its unwritten code of ethics and conduct for which the most effective sanction lies in the public opinion of the Service itself ...¹³

In the same vein, paragraph 59 states:

We content ourselves with laying down these general principles, which we do not seek to elaborate into any detailed code. ...Practical rules for the guidance of social conduct depend ... as much upon the instinct and perception of the individuals as upon cast-iron formulas... ¹⁴

G.P. Wilson indicated that the British approach has always relied on the discretion and judgement of civil servants. This approach places a great deal of faith in individual civil servants as well as department heads.¹⁵

The 1928 report also sets out the general rule on conflict of interest as follows.

A Civil Servant is not to subordinate his duty to his private interests; but neither is he to put himself in a position where his duty and his interests conflict. He is not to make use of his private affairs as to allow the suspicion to arise that a trust has been abused or a confidence betrayed ... ¹⁶

13. Quoted in Research Branch, Library of Parliament, op. cit., p. 28.

14. Ibid.

15. Wilson, op. cit., p. 320. Referred to in ibid., p. 29.

16. Quoted in Research Branch, Library of Parliament, op. cit.

More specific rules regarding conflict of interest applying to civil servants appear in various statutes, orders-in-council, Treasury circulars, etc. Moreover, many of the restrictions imposed by these rules are quite loose compared to those of the United States. For example, where a civil servant is involved in the issuance of a government contract, he must reveal this fact to his department head so that another individual can be assigned to the case in question. However, there is no absolute prohibition on a civil servant entering into contracts with his own department. Such contracts would have to be approved by the department head, which is probably unlikely, but nonetheless quite possible and is contemplated by the rules.¹⁷

The most extensive rule appears to be that on post-employment activities. However, even here, the difference with the more restrictive American regulations is dramatic. The British policy on post-employment activities originated in a "Memorandum on the subject of the Acceptance of Business Appointments by Officers of the Crown Services" dated 1937. This policy states that civil servants at senior levels must obtain the assent of the government before accepting offers of employment with business or other bodies:

- (a) which are in contractual relationship with the government;
- (b) which are in receipt of subsidies or their equivalent from the government;
- (c) in which the government is a shareholder;
- (d) which are in receipt from the government of loans, guarantees or other forms of capital assistance; or
- (e) with which services, or departments or branches of government are, as a matter of course, in a special relationship;

and in semi-public organizations brought into being by the government or Parliament.¹⁸

17. Ibid., p. 29.

18. "Acceptance of Outside Business Appointments by Crown Servants," in Report of the Royal Commission on Standards of Conduct in Public Life, 1974-76, p. 193.

This policy has remained the same since its inception. In 1975, Prime Minister Wilson, after stating that the rules were satisfactory, made two additions. First, a standing advisory committee was established and, second, a three-month "cooling-off" period was established before a civil servant could take up his outside position.

It is worthwhile to note that a 1968 memorandum from Treasury to the Royal Commission on the Civil Service stated that although permission to accept outside employment has rarely been refused, "public complaints about particular appointments has (sic) been avoided."¹⁹ Notwithstanding the lack of public complaints, there is no absolute prohibition against "switching sides". Approval can always be granted and usually is. Moreover, the three-month cooling off period is extremely short in light of the two-year period in the United States and Canada. Lastly, these restrictions apply only to very senior levels (under-secretaries and higher).

Extensive guidelines on several areas of ethical conduct are contained in two documents, namely, the Civil Service Pay and Conditions of Service Code, which essentially contains rules and instructions for all employees, and Establishment Officers Guide, which provides management with guidance parallel to, but fuller than, the Code. These two documents recently replaced the old and well-known document called Estacode.

(e) Australia

In Australia, Members of Parliament are governed by the standing orders of the two houses. Members of the House of Representatives cannot vote on issues in which they have a direct pecuniary interest not held in common with the rest of the subjects of the Crown. In reality this restriction is not significantly limiting since a holding in a widely held pecuniary interest will not disqualify a Member's vote.

Before a Member can be prevented from voting, it must be shown that his pecuniary interest is direct and personal and not one which is shared in common with many others. Members who held large blocks of railway shares were not prevented from voting, in 1947, against a bill seeking to nationalize

19. Research Branch, Library of Parliament, op. cit., p. 31.

railways because the financial interest involved was not limited to them but was spread widely over a large section of the citizenry.²⁰

A more limiting regulation is contained in Standing Order 326:

No member may sit on a committee if he is personally interested in the inquiry before such committee.²¹

A similar regulation is set forth in the Standing Orders of the Australian Senate.²²

However, even these regulations have not proven in practice to be all that strong. To begin with, only the Houses, not individual committees, have the power to prevent a member from taking part in committee hearings. And in one case where a member appeared to have a personal (although not financial) interest in a matter before a committee, the Speaker of the House of Representatives refused to make a definitive ruling, stating:

In my opinion the Chair is not able to determine whether or not a member is personally interested in a committee's inquiry and cannot properly be called upon to so decide. A member must be guided by his own feelings in the matter and by the dictates of respect due to the House and to himself. Having regard to the existence of the standing order and its terms, it is likely that if a matter of this kind is brought to issue it will be one for the House to decide.²³

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20. Research Branch, Library of Parliament, "Conflict of Interest Rules for Parliamentarians in Australia, France and the Federal Republic of Germany", Ottawa, 27 April 1979, p. 3.
 21. Standing Order 326 of the Standing Orders of the House of Representatives, op. cit., p. 65.
 22. Standing Order 292 of the Standing Orders of the Senate, J.R. Odgers, Australian Senate Practice, Canberra, The Commonwealth Government Printer, 1977, p. 283.
 23. Debates in the House of Representatives of Australia, Canberra, 19 September 1963, p. 1178.

The Government, in response, did not press the issue but expressed some disapproval.²⁴ In spite of this, the Member decided to sit on the Committee.²⁵ Similarly, the Attorney General in 1970 advised Senators that they would have to determine whether they were in a conflict of interest of this nature and how they should act. Since 1976, Australian ministers have been required to record their pecuniary interests with the Prime Minister's Office. However, this information is kept confidential, and there is thus no public disclosure.²⁶

In general, we conclude that although Australia has regulations on conflict of interest in place, either the regulations themselves are not terribly restrictive or they have not been enforced notably strictly. As regards Australian public servants, the primary regulatory document is the Code of Conduct which was endorsed by the Government. This Code sets forth ten general principles, some of which are as follows.

- (1) An office holder should perform the duties of his or her office impartially, uninfluenced by fear or favour.
- (3) An office holder should avoid situations in which his or her private interest, whether pecuniary or otherwise, conflicts or might reasonably be thought to conflict with his or her public duty.
- (4) When an office holder possesses, directly or indirectly, an interest which conflicts or might reasonably be thought to conflict with his or her public duty, or improperly to influence his or her conduct in the discharge of responsibilities in respect of some matter with which he or she is concerned, he or she should disclose that interest according to the prescribed procedures. Should circumstances change after an initial disclosure has been made, so that new or additional facts become material, the office holder should disclose the further information.

24. Ibid.

25. Research Branch, Library of Parliament, op. cit., p. 6.

26. Ibid., p. 9.

- (5) When the interests of members of his or her immediate family are involved, the public office holder should disclose those interests, to the extent that they are known to him or her.
- (6) When an office holder possesses an interest which conflicts with the duties of his or her office and such interest is not prescribed as a qualification for that office, he or she should forthwith divest himself or herself of that interest, secure his or her removal from the duties in question, or obtain the authorization of his or her superior or colleagues to continue to discharge the duties.
- (10) An office holder should not allow the pursuit of private interest to interfere with the proper discharge of his or her public duties.²⁷

As in Britain, great emphasis is put on self-discipline.

The code emphasises the importance of self-regulation in matters of conflict of interest. The onus is on the individual to be alert to any actual or potential conflict of interest, pecuniary or otherwise; to neglect to observe the principles set out in the Code may constitute misconduct and so may give rise to disciplinary action under the Public Service Act.²⁸

Some other regulations include the requirement of public servants to obtain approval of the Public Service Board for any external employment they may take²⁹, the prohibition against using any official information for non-official purposes³⁰ and the prohibition against the solicitation or acceptance of gifts

27. Public Service Board, Personnel Management Manual (Vol. 3), "Guidelines on Official Conduct of Commonwealth Public Servants", Canberra, 1982, pp. 25-26.

28. Ibid., p. 26.

29. Ibid., pp. 25-26.

30. Ibid., p. 29.

connected with official duties.³¹ In addition, post-employment regulations very similar to those in the United Kingdom have been adopted.³²

(f) New Zealand

New Zealand appears to have fewer conflict of interest regulations than any of the other jurisdictions which we have examined. The material at our disposal indicates no policy, for example, on post-employment activities.

A restriction on outside employment similar to that in Australia is contained in section 53 of the State Services Act. This section also places a restriction of sorts on the financial interests a public servant may hold.

An employee is not prevented from becoming a member or shareholder only of any company or society or persons registered under any Act.

Where, however, an employee's financial interest (including any equitable interest) in any undertaking is, in the opinion of the Commission, incompatible with the due and proper discharge of his/her official duties, the employee may be called upon to dispose of any such interest.³³

It is interesting to note that there does not appear to be any requirement for public servants to disclose any of their financial holdings.

The only other regulation that falls within our consideration of conflict of interest (outside of political activity) deals with the acceptance of gifts or presents. The Public Service Manual states:

An employee shall not, directly or indirectly, solicit or accept gifts or

31. Ibid.

32. Ibid., pp. 33-4.

33. State Services Commission, Public Service Manual (Section L) "Conduct of Employees," L 43. See also State Services Act 1962 s. 53 (2)-(3).

presents from any member of the public concerned, directly or indirectly, with any matter connected with the duties of the employee or in connection with the Public Service...

An employee shall not demand any fee, rewards, gratuity or remuneration of any kind whatsoever, other than salary and allowances, for services performed or to be performed by the employee, either in or out of the usual hours of employment, in connection with the Public Service.³⁴

It is apparent that the government of New Zealand has not viewed it as being necessary to develop an elaborate or extensive set of guidelines on conflict of interest.

(g) The United States of America

In 1978, Congress passed the Ethics in Government Act, calling for the creation of the Office of Government Ethics, a special unit within the U.S. Office of Personnel Management charged with responsibility for overseeing the federal executive branch ethical standards program. In particular, the Office of Government Ethics is responsible for the prevention of potential conflicts of interest situations in which government employees may be torn between their duty to serve the public impartially and the possibility of personal gain.

The federal executive branch developed its first formal policy guidelines on conflict of interest and standards of ethical conduct in 1965. These guidelines, set forth in Executive Order 11222, serve as the foundation for the regulations which appear in Part 735 of Title 5 of the Code of Federal Regulations. Generally, they prohibit government employees from soliciting or accepting gifts, loans, or special favors from any party which can be economically, legally, or otherwise substantially affected by either the employee's agency or the employee's official actions.

The law further forbids employees to do anything which would result in, or appear to result in:

34. State Services Commission, Public Service Manual (Section L) "Conduct of Employees," L 43. See also State Services Act 1962, s. 53 (2)-(3), L. 60-61.

- using public office for private gain;
- giving preferential treatment to any organization or group;
- impeding government efficiency;
- making a government decision outside official channels;
- losing impartiality of action; or
- in any way undermining public confidence in the integrity of government.

Office of Government Ethics lawyers and analysts not only uphold executive branch policies related to conflicts of interest, but also monitor the government's financial disclosure requirements, post-employment regulations, and agency education programs. In addition, the Office issues opinions and advice on certain ethics problems.

In terms of financial disclosure under the Ethics in Government Act, the Office of Government Ethics has responsibility for overseeing two types of financial reports required of the federal executive branch. The first are government employees at the GS-15 level and below involved in contracting, procurement, grants, or subsidies, or whose decisions have an economic impact on any non-federal enterprise and who must file confidential reports of their financial standing. Unless the head of an agency shows good reason to do otherwise, no information from these reports may be released. The second category consisting of top-ranking executive branch officials, including the President and Vice-President of the United States, must file a more comprehensive public report, due every May 15, covering general income, assets, and liabilities during the preceding calendar year. These reports are available to the public within 15 days of filing, either from the agency involved or, in some cases, from the Office of Government Ethics directly.

With regard to post-employment regulation, and the provisions of the Act, the Office of Government Ethics has issued a comprehensive set of post-employment rules which govern the activities of former federal employees. The rules are designed to prevent conflicts of interest in individuals with past ties to government and present ties to the private sector.

Among the post-employment restrictions are:

- a lifetime prohibition against representing anyone on a particular matter which the former employee

"personally and substantially" handled while with the government;

- a two-year prohibition against representing anyone on a particular matter for which the former employee had "official responsibility" while with the government. "Official responsibility" is defined in very specific terms in the Ethics in Government Act;
- prohibitions applying to former Executive Level personnel, military in the grade of O-9 or above, and SES members and government employees classified as GS-17 and above whose former positions involved significant decision-making power or supervisory responsibility, as designated by the Office of Government Ethics. These prohibitions include: (1) a two-year ban on assisting in representing, in person, anyone at a proceeding involving a particular matter which the former employee had handled personally and substantially while with the government, and (2) a one-year ban against oral or written attempts to influence the former employee's agency on behalf of anyone on any matter whatsoever. (However, the Office can rule that certain agency bureaus or divisions carry on separate functions from the rest of the agency. In such cases, former employees may be prohibited from communicating with the bureau for which they once worked, but are free to communicate with other bureaus in the agency.)

The Department of Justice, the Office of Government Ethics, and the agency involved share responsibility for enforcing these post-employment rules.

Ethics education is given great emphasis under the U.S. program. In order to keep federal employees up-to-date about the government's ethics program, each agency has a "designated agency ethics official" who distributes new ethics information, answers questions concerning conflicts of interest, and serves as a liaison with the Office of Government Ethics. Office staff members also visit agencies directly to provide assistance and assess agency compliance with the ethics laws.

Although the Office of Government Ethics renders formal advisory opinions on special matters, it more frequently gives advice on an informal basis. Government agency employees or members of the public with an ethics question involving a

particular agency are first to contact the agency's designated agency ethics official, before dealing with the Office of Government Ethics.

In conclusion, we note that the Ethics in Government Act, when passed by Congress in 1978, contained a five-year "Sunset" provision, with the result that in late 1983 it was necessary for the Act to be re-authorized by Congress, otherwise it would have lapsed and the operations of the Office of Government Ethics would have come to an end. This development could not have been more timely in terms of our review of conflict of interest policy and practice. Two Senate Committees and one House Committee in Congress seized themselves of this Act, and debated at great length the strength and weaknesses which five years of experience had demonstrated in the federal government's efforts to deal with conflict of interest problems. The result of this searching review led to a number of amendments to the Act, which were generally considered to improve weaknesses undetected in the system adopted five years earlier. We have reviewed the Congressional record and reports of these debates, and have benefited greatly from noting points of strength and weakness, drawn to our attention, so topically, by American officials.

(h) Approaches to Conflict of Interest and Standards of Conduct in the Private Sector

1. Professions

We have examined the treatment of conflict of interest by several professions in their respective codes of professional conduct or ethics--being law, medicine, accountancy, and engineering. These four are among the most visible and the longest established, with experience with respect to questions of conflict of interest. This in no way constitutes a complete survey, but serves to present, in general manner, the ways in which professions have dealt with the issue.

Engineering. Professional engineers are governed by provincial associations. We examined the codes of ethics of four of these associations. While not identical, they show a common concern about conflicts of interests which could be encountered by an engineer.

For example, l'Ordre des ingénieurs du Québec states that: "An engineer must safeguard his professional independence at all times and avoid any situation which would put him in a conflict of interest."

Likewise, the codes for professional engineers in Alberta call upon members to avoid conflicts of interest. The codes also require engineers to disclose to clients or employers

any conflicts of interest which do arise. An engineer in these provinces may continue in his relationship with a client in spite of the existence of a conflict of interest, provided that he has made proper disclosure and the client has authorized him to continue.

On a more specific level, the codes comment on certain types of conflict of interest situations which an engineer might encounter. The Code of Ethics of the Association of Professional Engineers of Ontario is perhaps the most extensive in this regard. It states, for example, that engineers should have no interest in supplies or equipment used by an employer. Engineers should also not act in a consulting role on any project for which they are also the contractor, unless this is disclosed.

While the provincial associations of professional engineers govern the conduct of individual engineers within their respective provinces, the Association of Consulting Engineers of Canada has some powers over member engineering firms. For this reason, the Association has developed a "Code of Consulting Engineering Practice". The Association's disciplinary powers are somewhat limited, being restricted to reprimand or ousting of a member firm.

The Association Code contains two rules relating specifically to conflict of interest. The first states that members "shall discharge their professional responsibilities with integrity and complete loyalty to the terms of their assignments." This admonition might be interpreted to require members to avoid conflict of interest situations. The second rule calls for members to disclose any conflict of interest to their clients.

Accountancy. Codes of conduct for Canadian chartered accountants are established by the provincial chapters of the Canadian Institute of Chartered Accountants. The Rules of Canadian Professional Conduct of the Ontario chapter state that one of the characteristics of a profession is that "there is an outlook, in the practice of the calling, which is essentially objective". In addition, "there is acceptance by the practitioners of a responsibility to subordinate personal interests to those of the public good."

Two basic notions of wide-ranging applicability are presented. First, the notion of non-partisanship and objectivity in the performance of one's job; and, secondly, the sense of having a responsibility to the public. Not only are these ideas both relevant to all professions; they would also be applicable to public servants.

The Rules of Professional Conduct go on to deal with conflict of interest more specifically. They state that the

demands of society on its institutions require that chartered accountants be objective and conduct themselves with integrity in the provision of their professional services. It thus becomes a cardinal position of a member of a profession that he will not subordinate his professional judgement to the will of others, and that he express his conclusions honestly and impartially since "the public must be assured of the chartered accountant's freedom from any conflict of interest..."

Since the public must be protected from any conflict of interest involving accountants, a "reasonable man" test is to be applied by the profession to determine whether a practitioner's independence or objectivity has been compromised. The Rules state that:

Any member who is engaged to express an opinion on financial statements shall hold himself free of any influence, interest or relationship, in respect of his clients' affairs, which impairs his professional judgement or objectivity or which, in the view of a reasonable observer, has that effect.

Individual accounting firms may also have their own office code which deals with professional conduct and conflict of interest. For example, a major firm's "Notes for Professional Staff" state that partners and staff must adhere "to the rules of professional conduct established by ... provincial institutes or order of chartered accountants and of management consultants".

This office code goes on to state specific rules for certain types of situations. For example, partners must not accept gifts from a client. Likewise, they may not invest in shares or securities of client companies. It is also noteworthy that the firm requires that audit staff members have a responsibility to notify their manager or partner if they are assigned to an audit where they have been employed, have a relative employed, or have a relative employed by a competitor of our client. This requirement exhibits a general parallel with government post-employment activity guidelines.

Medicine. Doctors in Canada are licensed on a provincial basis. However, the only code of conduct for medical practitioners is the Code of Ethics promulgated by the Canadian Medical Association (CMA).

The CMA's Code of Ethics does not deal specifically with the issue of conflict of interest. However, several of the items in the Code deal with specific types of situations which might be viewed as presenting a potential conflict of interest. For

example, the Code states that a physician, prior to examining a patient on behalf of a third party, should communicate to the patient his legal responsibility to the third party.

With regard to financial arrangements, physicians are required to avoid "any personal profit motive" in regard to the ordering of drugs, diagnostic procedures, etc. As an example, this clearly would prohibit a doctor from owning a radiology clinic to which he might send patients. At the same time, physicians are obliged to refuse any sort of payment for services from persons other than the patient. In addition the Code of Ethics states that an ethical physician, when a witness, will recognize his responsibility to assist the court in arriving at a just decision.

The effectiveness of this Code may be called into question by some. There may be cases where some physicians prescribe unnecessary treatment or where some doctors receive free samples of medication from time to time from pharmaceutical companies. On the subject of medical professionals appearing as witnesses, the concern for serving the ends of justice would not appear to be as clear in practice as it is in the Code. For example, psychiatrists in criminal cases tend to be identified as either prosecution or defense witnesses. There are apparently some undesirable practices which the Code of Ethics has not completely eradicated.

Law. Canadian lawyers are licensed and governed by the provincial bar associations. All of these associations have their own codes of professional conduct. In addition, the Canadian Bar Association (CBA) has published such a code.

The CBA's Code of Professional Conduct provides perhaps the most extensive treatment of professional ethics and conflict of interest of any professional association. The general rule put forth is that lawyers:

must not advise or represent both sides
of a dispute and, save after adequate
disclosure to and with the consent of
the client ... should not act or continue
to act in a matter where there is or there
is likely to be a conflicting interest.

A conflicting interest is defined as one "which would be likely to affect adversely the judgment of the lawyer .. or his loyalty to a client ... or which the lawyer might be prompted to prefer to the interests of the client"

The Code goes on to provide commentary illustrating the types of situations which might occur. Conflicts of interest are not restricted to the financial affairs of lawyers. The responsibility to disclose conflicts of interest to a client is also considered. In some cases, a client may, quite properly, wish to retain a lawyer in spite of a conflicting interest. Other cases may require the lawyer to withdraw altogether. The Code leaves considerable room for professional discretion based on the particulars of the specific case.

Individual law firms have published their own policies to supplement the codes of their bar associations. For example, a major Canadian firm has set out specific guidelines with regard to such issues as borrowing from clients, trading in the public securities of clients, and investing in clients or their businesses other than through publicly traded securities.

It would appear that the legal profession has the most extensive set of ethical guidelines, based on high principles of honesty and integrity, of any professional group. However, this has not prevented the legal profession from being the subject of public mistrust or suspicion. Despite the well-intentioned and high-principled codes, there has existed, in varying degrees, a lay perception that lawyers do not always act in a principled manner and are not always trustworthy.

A graphic example occurred during the "Watergate" crisis. It was noted that a large number of the conspirators were members of the legal profession. When the Chief Legal Officer of the United States, Attorney General John Mitchell was indicted and convicted of criminal offenses, the reputation of the profession was brought into question. Although many of the guilty lawyers were disbarred, the fact remains that high-sounding codes of ethics and conduct did not prevent offenses being committed. The argument may be advanced that lawyers are no more moral and upright than other members of society and that their personal foibles and greed may enter into their professional behaviour.

Such an attitude may be partly a response to the nature of large, traditional, self-regulating professions. Lawyers, doctors, accountants, engineers, etc., all deal in complex fields of specialization which are something of a mystery to many lay people. The fact that these professions are self-regulating furthers the feeling that they constitute a monopoly control of specific knowledge. Clearly, a counter-argument can be advanced. However, professional codes of conduct and redress mechanisms are not, in and of themselves, sufficient to guarantee public trust and public well-being.

The reasons for this could be twofold. First, codes of professional conduct could be incomplete as regards conflict of

interest. However, our examination of various professional codes indicates a widespread, consistent, and reasonably deep concern with the necessity to avoid such situations. By and large, professional codes of conduct exhibit an appropriate and satisfactory degree of concern with this issue. The second possible reason for the occasional failure to protect the public concerns the willingness of professional associations to apply them and to police the membership. Given that professional associations are self-regulatory, and that codes call for a high degree of respect and even collegiality between members, it is not surprising that enforcement of codes of conduct could be somewhat lax in certain situations. The primary objective of professionals is to carry on a practice, not to administer others doing the same thing. Finally the very notion of professional judgment implies a trust in the honour and integrity of individual practitioners to conduct themselves appropriately.

We therefore conclude that cases where the public has not been adequately protected from abuses of privilege probably arise out of innate characteristics of the self-regulating professions - their homogeneity, their cliquishness, and their elite position of control of crucial technical knowledge. These characteristics have made it difficult (and somewhat understandably so) for these groups to adequately apply force to their codes of conduct in all cases. That being said, it must be added that the record of conduct of the vast majority of professionals has been above reproach.

Professional codes seem to be fairly comprehensive vis-à-vis conflict of interest. They tend to state rules fairly generally, but this is, in our view, an appropriate stance. Any difficulties that have arisen with regard to enforcement seem to be the result of a lack of inclination or due to administrative machinery rather than as a result of deficiencies of the codes.

Some of the deterrents to professionals acting to discipline one of their own do not exist in the public service. The government is not a homogeneous body of independent practitioners. There is not the same collegial attitude as in the major professions. Moreover, public servants are all employees of the Crown. This is quite distinct from the situation of partners in an independent professional concern. These individuals are self-employed, thus adding to their independence. Nonetheless, the public service will have to ensure the enforceability of any new code it adopts. If reliance is placed on individual managers (under the responsibility of deputy ministers and heads of agencies) to enforce such a code, there may be problems of variability in treatment as well as concern. Quite simply, some managers may not consider the issue of conflict of interest to be that important.

2. Business Corporations

There is a general perception that conflict of interest concerns and business morality generally are more lax in the private sector. This may also be accepted to some extent because private business is just that - private - and does not entail the public trust that work in government does. Thus, it is not surprising that some of the companies which we contacted in our examination of private sector practices did not have any codes of conduct or conflict of interest policies. At the same time, we did receive copies of quite a few codes of business ethics. These codes tend to come from fairly large corporations which would be likely to have the manpower and expertise to develop them.

Contrary to the notion that "anything goes" in private business, large corporations, with publicly traded securities and large numbers of employees, do have a need for guidelines on professional conduct. Employees of such organizations are viewed as having responsibilities and duties of trust to shareholders and the organization as a whole. They owe their first business allegiance to the company, and therefore they must remain free of interests or relationships which are harmful or detrimental to the company's best interests. Employees should avoid not only a real conflict of interest, but also the appearance of one which could tarnish their own or the company's image.

Most of the corporate codes which we have examined deal with the same types of issues. For example, a common concern is that employees should not have an interest in supplying goods or services to the company. Likewise, private companies obviously do not want employees to hold an interest in a competitor. Another common concern involves payments to government officials or customers. Generally, nothing of value (including cash payments, gifts, favors or entertainment) may be given, paid, promised or offered, directly or indirectly, to any government officials, customers or prospective customers for the purpose of securing a preferential governmental or customer action.

At least two companies have codes that deal with political contributions. Federal election campaign laws in the United States prevent corporate political contributions. Individual employees have the right to make personal contributions but employees operating in jurisdictions within or without the United States where corporate political contributions are illegal may make personal political contributions to candidates and organizations of their choice. Of course, no employee should make a personal political contribution with a view to assisting the company in obtaining or retaining a business.

Corporate codes do not generally go into extensive detail on conflict of interest, being aware that one cannot possibly identify all specific types of situations that might arise. However, these codes do state the basic principles in a clear and forthright manner; principles which are consistent with those that the government has adopted and which we view as proper.

3. Business Codes of Ethics

In the course of our meetings, we have heard well-informed and senior government officials express the view with considerable conviction that standards of conduct in the public sector must be set higher than in the private sector, the inference being that in the business community, for example, "anything goes".

Generalizations are unreliable because they fail to take into account the great variety of conditions which actually exist, and certainly we have seen cases with private sector companies of highly developed codes of ethical conduct and strict adherence to them. Several dozen corporations which provided us with copies of their codes of conduct and conflict of interest policy statements are shining examples of what is possible.

One major resource corporation emphasized that it views the conflict of interest question, along with strict compliance with combines laws, as part of the whole subject of ethical behaviour in the corporation. It takes pride in its tradition of high principles and takes pains to maintain the highest standards of business practice. The company's corporate reputation rests upon the ethical behaviour of each individual who works for it; consequently great importance is placed on the appropriate and regular communication of these goals to employees. This program is reviewed annually by an internal committee responsible for evaluating the effectiveness of communication with employees in this regard.

This particular company, to continue with the same example which is typical of many Canadian corporations, communicates its views on ethical behaviour to all employees through a publication Corporate Ethics: A Statement of Role and Principles. This publication is distributed to employees upon joining the company, and at appropriate intervals during their careers. The publication is accompanied by a letter from the Chief Executive Officer, thereby indicating the priority attaching to matters of ethical conduct in the company.

There is, of course, a special group of employees who, by virtue of their role in managing the company, or through their exposure to confidential information in the course of their employment, are exposed more explicitly to potential situations where conflicts of interest might arise. As part of this corporation's audit and review procedure, these employees are asked to sign an annual statement confirming compliance with the company's policies on business ethics, conflict of interest, and related matters.

The strength of this approach appears to be that, first, the company endeavours to make its code of behaviour as explicit as possible to employees, and second, the company provides a mechanism for counselling and review with company officials in areas which employees may feel to be unclear or ambiguous. There is no question that the responsibility for disclosure rests with the employee.

In reviewing the program and procedures of various corporations such as this, we conclude that in a number of instances, Crown corporations and a number of departments of the federal government could learn from the private sector. This is true particularly with respect to reformulating the rules to make them clear, having supplemental codes, putting explicit guidance in particular cases, providing a greater emphasis on seeking advice and guidance with respect to conflict problems when they arise, and heightening the educational role and general awareness with respect to the conflict of interest rules.

CHAPTER 11

PARTICULAR ISSUES AND CONSIDERATIONS

Before proceeding with the main recommendations, it is appropriate to examine the impact of conflict of interest rules on specific groups and categories of public officials and on a number of particular issues, namely (a) privacy and confidentiality, (b) short-term agencies, (c) the investment of money and the ownership of property by those in government, (d) involvement in "outside employment" by those in government service, (e) the nature of "lobbying in the Canadian political system", (f) the application of rules to spouses and other family members, (g) confidential information and compellability to testify, (h) sanctions and penalties, and (i) the relationship between the public and private sectors.

(a) Privacy and Confidentiality

The passing into law of the Privacy Act and the Access to Information Act did not affect the procedures associated with the handling of files and documents relating to the administration of the conflict of interest guidelines.

Personal and confidential files pertaining to Governor-in-Council appointees, ministers of the Crown, and their exempt staffs are still not accessible to the general public under any circumstances and are treated like papers bearing a confidential security classification. The only documents made available to the general public, on request, are those placed in the Public Registry in the Office of the Assistant Deputy Registrar General.

(b) Short-term Agencies

Short-term agencies such as royal commissions and task forces are set up by the government for a myriad of reasons and are a highly useful and economic means for dealing with particular subjects in an expeditious manner. Such agencies are introduced by various means including existing legislation, the prerogative of the Prime Minister and the Inquiries Act. The type of agency created and its purpose will, to a great degree, determine its personnel requirements. The question arises as to the

appropriateness of subjecting this personnel to a conflict of interest régime.

In many cases, individuals are appointed to short-term agencies from outside the public service. At the end of their assignment, they normally return to private life. The application of post-employment guidelines, which include a cooling-off period, in these cases would make it difficult for the government to recruit qualified people. Moreover, it would not be reasonable, in all cases, to require them to renounce current interests and directorships for a very short period of time.

The type of work to be performed by the agency must be considered carefully as well. If individuals from the fishing industry are appointed to conduct an investigation into certain fishing practices, there could be potential for conflict and they could properly be asked to divest themselves temporarily through trust management of their holdings in that industry. On the other hand, if a group is convened to study the effects of moving an embassy from one city of a foreign country to another, the possibility for conflict is remote, probably non-existent.

In summary, no rule of general application can be established. The advice of the Ethics Counsellor should be sought in each case where the extent of the conflict of interest is unclear.

(c) The Investment of Money and the Ownership of Property by Public Office Holders

1. The Investment of Money

The present guidelines require that ministers and Governor-in-Council appointees place in trust, or otherwise divest themselves through sale of all shares in companies which are traded on public exchanges and all other non-exempt or controlled assets. Public servants are also required to so divest where such holdings do or could conflict with their official duties.

Under the current guidelines most mutual funds are considered to be exempt property if they are held for retirement income purposes. Also, the ministerial guidelines consider all mutual funds as exempt assets. Individuals with such holdings are considered to have the equivalent of a blind trust as the very nature of a mutual fund is such that it is managed by another individual having no consultation with the owner.

The Tradex Investment Fund Limited is one such incorporated mutual fund which invests in corporate stocks and bonds, and which sells its shares on a continuous basis. The

management of the Fund's assets is entrusted to an investment counselling firm. Only public office holders or their families can be shareholders of Tradex.

In recent years, the majority of directors have come from the Department of Industry, Trade and Commerce and Statistics Canada. Some officers of these departments have access to confidential information about the assets and performance of corporations that is not available to the public. The Fund's directors and managers have taken a number of steps to avoid possible accusations of senior public servants using insider information to guide Tradex investment decisions. The following statement has appeared in the Tradex Fund Prospectus for the past five years.

Under an agreement effective the 5th day of June, 1969 the Fund retained Sceptre Investment Counsel Limited (hereinafter referred to as Investment Counsel), ... to act as Investment Counsel to manage the investment portfolio of the Fund. The Investment Counsel selects, purchases, sells and maintains a continuous supervision of the securities in the Fund's portfolio. The agreement, in accordance with the restriction in the letters patent of the Fund, provides that the Investment Counsel will not solicit, receive or act upon any advice or information which may directly or indirectly come to it from any director or shareholder of the Fund. The purpose of that provision is to prevent a director or shareholder from affecting or influencing the selection or disposition of the securities of the Fund. The Board of Directors, through its Investment Counsel Liaison Committee, regularly evaluates the performance of Investment Counsel but as stipulated in the letters patent no recommendations are made to the Investment Counsel on the sale or purchase of any individual security. (Emphasis added).

We are informed that Tradex is regarded in relation to conflict of interest purposes in exactly the same light as other diversified mutual funds.

The Office of the Assistant Deputy Registrar General, in the performance of its duties, comes into contact with many new and different investment schemes. It has prepared a number of internal memoranda to familiarize staff members with the multitude of sophisticated investment vehicles now available to Canadians. These memoranda outline certain considerations and procedures in evaluating how these types of investments may or may not be compatible with the conflict of interest guidelines.

2. The Ownership of Real Estate

In general, public office holders are subject to the same rules with respect to the treatment of real estate property holdings where conflict of interest may arise, as other people. There are, however, some special rules and some special problems which relate specifically to them.

Certain Governor-in-Council appointees are required to be farmers in order to qualify for their appointment. Their farms are publicly disclosed and there is an exchange of letters between the individual, the minister responsible and the Assistant Deputy Registrar General to take this into account, the understanding being that the law takes precedence over the conflict of interest guidelines.

If a farm is purchased by an official who knows that the government is intending to purchase the land at some point in time, that person could be held to have used official information to further his or her personal gain.

There are a number of specific instances in which the ownership of property must be carefully assessed. Transactions between the government and the public office holder for the purchase and sale of real estate raise potential issues described by O.P. Dwivedi as follows:

Civil servants, like other citizens, can acquire or dispose of any immovable property by lease, mortgage, purchase, sale, gift, or otherwise, and no previous sanction of the government is necessary. But no purchase can be made from, and no sale to, any civil servant without the express sanction of the Treasury in the case of government property. Moreover, it has been a custom not to permit civil servants to take part in the auction of government property if they are related to the department which is sponsoring the auction. Except for this informal

restriction, there is no other restriction on the purchase or sale of property by civil servants. Because of the absence of any restriction, there may be a possibility of corruption among some senior civil servants. There have been a few cases where civil servants managed to purchase costly land for a nominal price because they obliged the other party in some way by using their official status. To avoid this temptation among civil servants, it is necessary to impose some restrictions on their purchase or sale of property. They should be required to obtain permission from their deputy minister before buying or selling any piece of land.¹

Problems also arise when a person is acting as a trustee for an estate where the holdings are intended to be expropriated by his or her office.

Finally, the acquisition of public assets can raise potential conflicts for officials with relevant confidential information who are in a position "to acquire or rent surplus public assets through means which are not equally available to the general public." Illustrations of this type of problem include:

1. acquiring surplus Crown assets, unclaimed or confiscated private goods, or commercial-type by-products of government programs, before they have been offered for sale to the public, or while the official's office is involved in their disposal;
2. acquiring a lease for Crown property whose public availability has received only limited publicity.²

1 O.P. Dwivedi, "A Code of Conduct for Civil Servants", The Dalhousie Review, 44, No. 4, (1964-65), pp. 454-455.

2 Report of the Interdepartmental Committee on Conflicts of Interest (Jean Boucher, Chairman), 1972, p. 2.

(d) Engagement in Outside Employment by those in Government Service

As noted in Chapter 7, the problem of holding down two or more jobs simultaneously was one of the first dealt with by Order-in-Council as the Government of Canada began to create written rules to govern conflict of interest problems arising in the public service. The Ministers' Guidelines and the Governor-in-Council Guidelines are quite specific on this subject. They state that the individuals to whom they apply may not, while holding office, engage in the practice of a profession or in the management or operation of a business or commercial activity. Nor may they retain or accept directorships in any commercial corporation.

In general, public servants are not prohibited under the present guidelines from engaging in outside employment where it is not specifically prohibited or where it does not conflict with their official duties. Yet this provision is obviously open to ambiguous interpretation, and quite properly might be extended quite far. For instance, even if a second job which a public servant held during the night-shift did not in any way conflict with the nature or type of position held with the government during the day, an employee who works all night and catches up on sleep in the office during the day, and therefore is unable to deliver a full day's work for a full day's pay, is involved in a conflict of interest.

A conflict of interest situation may develop, or appear to develop, when an employee's actions enhance the financial interests of his part-time employer. Other conflicting situations which may be included under this category are those where supplementary employment or self-employment reduces to an unacceptable level the interest or energy an employee devotes to his or her government job; where outside employment may require an employee to use government services and property (such as telephone services and stationery); and where outside employment is performed in such a way as to give the impression of an official act or to appear to represent an official (governmental) point of view.³

Yet in some situations, certain types of remunerated outside engagements can be in the interest of the public service as well as in the professional interest of the public office

3. Kenneth Kernaghan, Ethical Conduct: Guidelines for Government Employees, op. cit., p.14.

holder concerned. As noted in the Report of the Interdepartmental Committee on Conflict of Interest (1972) (p.3) a number of public officials are invited to lecture, particularly at the universities in the National Capital, on matters that are non-confidential and do not relate to current government policies. Their teaching is often not only relevant to their functions in the public service, but it provides an opportunity to keep abreast of the advance of knowledge.

Of some concern is the recent proposal for shared work, under which the functions or services of many federal public servants would be fulfilled by two people, rather than one, dividing their time. Its implication for conflict of interest is clear enough. Shared work means mid-level public servants working two or three days a week, or five half-days a week, and thereby having a significant amount of free time. Given the interest, motivation and knowledge of these individuals, it is predictable that, before too long, some would seek additional outside employment, perhaps through consulting companies in which they were the principal. It is reasonable to expect that this outside work would be akin to that which they are, at other times, providing for the government. Such a development, would, in essence, make the "post-employment" problem a matter of daily and widespread concern.

The current restriction on outside employment relates to the employee's possible unauthorized use of information obtained in the course of public service employment, and to actual or potential conflicts of interest resulting from outside employment activities. While some departments have restrictions on outside employment expressed in their supplemental codes of conduct, others have reported difficulties in formulating clear guidelines on these matters. The objective of such guidelines is to be fair both to the individual and the employer, while at the same time encouraging research, participation in professional associations and intellectual interchange with the community.

For public servants, there is no existing requirement for deputy head authorization for outside employment (except where such employment is to be with another part of the government) and the introduction of such a requirement would likely provoke considerable negative reaction from public servants. However, the point might well be highlighted in supplemental codes, which could at least specifically mention the problem of outside employment, and recommend and encourage employees to seek deputy head clearance. Where such approval is obtained, it could help eliminate any suggestion of improper conduct which might be raised subsequently.

The issue of public office holders engaging in outside employment is not always a clear-cut question between public and

private interests. To illustrate, in many instances, the public service is pre-eminent in Canada, if it does not have a virtual monopoly, in having staff who possess certain skills and knowledge. Because of this, it would seem in the public interest that public servants be able to make their skills and knowledge available to the private sector during their off-duty hours. This is particularly the case with some of the staff of Environment Canada, a department in which there is a high concentration of technical and scientific ability.

The Department of the Environment has a mandate to promote and develop many scientific capabilities and to enhance public awareness and appreciation of these within its sphere of activities. It seeks to achieve this, in part, by encouraging private sector capability through such means as grants, agreements and contracts with the private sector; by making available consultative services; by ranking available information and through publicity and educational programs. There are, however, monetary and personnel constraints upon the department's capacity to achieve these objectives, and it is felt that some of the goals that it seeks to attain could be advanced if employees were permitted to employ their skills in the private sector during their off-hours.

The conflict of interest guidelines presently in place appear to be such that the department is severely restricted in some instances in granting any authorization for off duty work of the same nature as the public servant is engaged in while working for the government. Not only must public servants' conduct be above blame and free of any wrongdoing in fact, the acceptance of outside employment by a public servant must not be permitted to give rise to question in this regard. Consider for example this injunction: "It is by no means sufficient for a person in a position of responsibility in the public service to act within the law. There is an obligation not simply to obey the law but to act in a manner so scrupulous that it will bear the closest public scrutiny....", and phrases like "appear to exist," "appear to benefit," "conceivably be construed" and "call into question". Because of the stringency with which the guidelines are drafted and their broad scope, it is virtually impossible for some employees not to encounter a conflict of interest situation if they take outside work of the same type they are engaged in for the department, no matter how scrupulous and open they are and despite the fact that in the departments's view, such outside activity would benefit Canadians.

The department employs meteorologists (weather forecasters). In Halifax, one of these sought to work part-time for a private, Canadian firm that provides site-specific weather forecasts to oil drilling companies. Private meteorological forecasting is a fledgling industry on the Atlantic coast,

although such services are available from competing American firms. The Canadian firm's competitive existence depends upon its ability to employ government meteorologists on a part-time basis to supplement its full-time staff. The department has been advised that should the employee in question take up such outside employment, he would be in a conflict of interest situation. Since the proposed employer uses weather forecasting services made available by Atmospheric Environment Services, it is conceivable that it might get preferential treatment were it to call the weather office and be dealt with by the employee fulfilling government duties. This would place the employee under an obligation to persons who might benefit from special consideration or favour or who might seek to gain special treatment, which is contrary to the conflict of interest guidelines. The employee's capacity to perform his duties in an objective manner could be called into question. It is also possible that were he or she to call the weather office to get information while working for the company he or she might get preferential treatment from fellow employees, or at least this could appear to be the case.

During the course of his or her government duties, the meteorologist gains information which he or she uses to predict the weather. On leaving the government shift and going to work for the company, he or she takes the information and uses it in preparing weather forecasts for the company. The department does not feel that there is anything wrong with this, yet the guidelines require that a public servant not benefit, or appear to benefit, from the use of information acquired during the course of his official duties, which information is not generally available to the public.

In many Canadian cities, Atmospheric Environment Service provides weather broadcasts free of charge to radio stations. There is no guarantee that a radio will get any particular meteorologist when it calls in. However, some radio stations would like to have a personality and a voice giving the weather forecast identified with the station. Some have a preference for particular meteorologists because of their voice or manner of presentation. In order to assure themselves of the services of these meteorologists, radio stations have sought to employ some of them to give radio weather broadcasts outside their working hours.

The department favours such outside employment for several reasons. It is responsible for the diffusion of weather information to the public and needs and welcomes the broadcast of weather information by the privately owned media. It considers that the science of meteorology is better served and that its perception by the public is enhanced if trained meteorologists give weather broadcasts rather than announcers. For monetary, as well as staff relations reasons, the department does not feel it can, or should, guarantee that radio stations have a weather

forecast broadcaster identifiable with a particular radio station. In general, the department doesn't object to such off-duty work by its meteorologists since they promote department goals and the science of meteorology. However, there is concern that employees taking up such work may be in conflict with the guidelines.

The meteorologists in question are undoubtedly attractive to their prospective employers because they are employed by Atmospheric Environmental Service. In order to prepare for their morning broadcasts, they consult with the meteorologists on duty at the government weather office. (Weather offices operate 24 hours a day). It is possible, particularly if the off-duty meteorologist who is doing the weather broadcast for gain is a supervisor, that preferential treatment may be given by a co-worker who is on duty at the weather office, or this could appear to be the case. It can be seen that an apparent contravention of the guidelines does not necessarily indicate wrongdoing or a breach of the public interest. In fact, the opposite could be true.

(e) The Nature of Lobbying in the Canadian Political System

Elsewhere in this report, in discussing ambiguous wording in the present guidelines, we ask "what is lobbying?" because the post-employment guidelines for ministers stipulate that they should not, within two years of leaving office, "lobby" for or on behalf of a person or commercial corporation before any department or agency for which they were responsible on an ongoing basis during their last two years in the ministry.

The question of lobbying is a difficult one, because there is no precise and commonly accepted meaning of the word. Lobbying started with the English House of Commons where, in a large ante-room known as the lobby, persons with special interests could meet with the legislators before they entered the House, in an effort to convince them of the need to support a particular cause, or to see an issue from a particular perspective. During the 1800s in the United States lobbying and lobbyists earned a reputation from which their descendents today have yet to clear themselves completely. While there is recognition that lobbying can be a constructive force (providing information, contacts, alternate perspectives), there is concern that it may reflect ulterior motives. It now is more respectable, and in the United States lobbyists operate openly as registered advocates for employers by appearing before legislative committees and regulatory agencies, often supplying useful information on complex issues.

Activity by former ministers in the realm of providing information to government to bring about certain public policy

objectives could be seen as a recommendation rather than an attempt at lobbying. However, seeking special privileges or preferential treatment is not permissible. There is a distinction to be made, too, on the basis of whether one engages in such activity for pay.

Section 110 (1) (a) of the Criminal Code prohibits an "official" from directly or indirectly agreeing to accept any form of benefit to assist, cooperate, exercise influence or for an act or omission in connection with any matter of business relating to the government or a claim against the government or any benefit it is entitled to bestow. This offence is aimed at persons with official positions who offer to use their office to influence government business decisions, whether or not in fact they are able to do so, and is often referred to as influence-peddling. It is relevant in trying to determine the outer bounds of permissible lobbying activity.

Also, s. 108 of the Criminal Code prohibits a member of Parliament from corruptly accepting, or agreeing to accept, "any money, valuable consideration, office, place or employment for himself or another person in respect of anything done or omitted or to be done or omitted by him in his official capacity."

The Senate and House of Commons Act, in section 23 (1) prohibits a member from receiving compensation for services rendered in relation to any matter before Parliament, or to influence him. Further, a member is prohibited by Standing Order Number 14 of the House of Commons, from voting on any matter in which he or she has a direct pecuniary interest, and the vote of any member so interested will be disallowed.

Beauchesne's Parliamentary Rules and Forms proscribes the acceptance of fees by members for professional services connected with any proceedings or measures of Parliament, and indicates that it is not consistent with parliamentary or professional usage for a member to advise as a paid counsel upon any private bill before Parliament.

The traditional discussion of lobbying has centered on the relationship which groups and interests have with legislators. It appears that usage of the term "lobbying" in this sense in Canada has an extended definition, to include representations and interventions made to the public servants handling a particular matter. In these instances, there may be no piece of legislation currently before Parliament which is relevant, and the lobbyist simply is seeking favourable interpretation of existing provisions, a change in regulations, or special consideration under existing programs and services.

The American experience in registering lobbyists and the increasing pressures in the United Kingdom for new rules in this area have been noted. The subject was discussed in Canada in the 1973 Green Paper entitled Members of Parliament and Conflict of Interest. We conclude only that there is uncertainty as to the commonly used meaning of the word "lobby", and therefore recommend that it not be used in any rules governing ethical conduct at the federal level in Canada. Alternate words, clear meaning and more precise application, should be chosen in cases where the perceived problem is to be addressed. The word is not used in any of the reformulated rules recommended in this report.

(f) Application of Rules to Spouses and Other Family Members

In the course of our hearings and in discussion, the issue arose as to the application of conflict of interest rules, particularly those requiring Cabinet ministers to divest themselves of assets, to the minister's spouse and other family members as well. To some, it seemed reasonable and in the public interest; to others, it seemed grossly unfair.

Essentially, two separate schools of thought are in conflict. One is the movement for greater openness and ethical conduct in government, with strict conflict of interest laws.

The other is the "Feminist Movement", or "Women's Liberation", view emphasizing independent careers of women in the workplace. While the reference to "spouse" in the conflict of interest guidelines applies to either a man or woman, most Cabinet ministers have been men, and until recently most of their wives did not have separate business careers, although some had investment portfolios. In contemporary society, a Cabinet minister, whether male or female, is more likely to have a spouse with an independent career.

The 1979 guidelines applicable to ministers initiated by Prime Minister Clark, included restrictions for spouses and dependent children, a fact which gave rise to contentious application of the rules when the wife of at least one Cabinet minister initially refused to have her independent and separate financial holdings governed by these guidelines which after personal intervention by the Prime Minister she chose to follow. The 1980 guidelines for ministers reverted to the earlier position. The leader of the New Democratic Party has submitted this view to us:

The 1980 guidelines expressly exempt spouses and dependent children from their purview. This reflects a view that each spouse may wish to pursue her or his own career. Because their

careers are "independent", the financial details of only one are now required to be disclosed. This is wrongheaded. Despite separate careers, marriage remains in part an economic union, a partnership of equals. As has been recognized to varying degrees in family law reform legislation, each spouse may have a pecuniary interest in the economic activities of the other during (and after) a marriage. The conflict of interest provisions should not ignore this interest.

A former Cabinet minister suggested that individuals who become Cabinet ministers become "public property", having knowingly launched themselves on this course, and must expect as part of the régime, application of conflict of interest rules not only to themselves but to their spouse and immediate family as well.

In our review of the provincial and territorial provisions in this area we note that except in Manitoba, Nova Scotia and Prince Edward Island the conflict of interest rules apply to family members. In those provinces where the guidelines extend to the family, there is variety in the nature and extent of this further application. For example, in Ontario and Quebec the rules apply to the spouse and minors; in New Brunswick to the spouse and dependent children; and in Newfoundland to the spouse and those within one degree of relationship by marriage. In Saskatchewan they apply to the spouse and dependent children but only if they act on behalf of the member of the Legislative Assembly, while in Alberta rules apply to the spouse (unless legally separated) and to minor children. In the Yukon, the rules apply to the spouse and dependents residing with a minister, while in the Northwest Territories, they apply to a dependent spouse, son, daughter or other relative living in the same house.

Our view is that the rules as stated in the current guidelines applicable to ministers represent a fair balance or compromise between the competing interests in this area. These 1980 guidelines do not apply directly to spouses or dependent children of ministers. The rule then adds:

It goes without saying that ministers must not transfer their assets to their spouses or dependent children with a view to avoiding the requirements of these guidelines. Ministers should also bear in mind their individual responsibility to prevent conflicts of interest, including those that might

conceivably arise or appear to arise out of dealings in property or investments which are owned or managed in whole or in part, by their spouses or dependent children.

The wording of this current provision might be clarified, and should be included in the procedural rules used to minimize conflict of interest situations.

Departments have reported some difficulty in dealing with holdings of family members which may create conflicts of interest for employees. While such holdings do not have to be declared, there may be occasions where employees consider that they place them in an actual or potential conflict in relation to their position and duties. In line with the spirit of the guidelines, employees are encouraged to act "in a manner so scrupulous that it will bear the closest public scrutiny", and use the declaration process to indicate good faith.

In administering the conflict of interest guidelines for the public service, care must be taken to ensure that the rights of spouses and other family members are respected. Nevertheless all employees should be aware of the need to examine carefully and, if necessary, disclose spousal assets and businesses (existing or new) which could be seen as conflicting with the partner's employee's official duties. Transfers of assets to a spouse or to members of an employee's immediate family must not be made to avoid the requirements of the conflict of interest guidelines. It is recommended that clarification of declaratory responsibility relating to spousal and other family members' assets and activities be incorporated in all departmental codes of conduct.

(g) Confidential Information and Compellability to Testify

In the course of its investigations, the Task Force examined the area of the use of information acquired through government channels for other than official purposes and its observations follow.

1. Compellability to Testify

A submission was presented by several employees of the Aviation Safety Bureau of Transport Canada expressing concern that when such employees are subpoenaed as expert witnesses, their testimony in court could be in direct conflict with their duties because: 1) they could appear to be in danger of prejudicing the necessary impartial judgement and objectivity required to perform their regular duties; and 2) they may be called upon to testify on the basis of their own conclusions, which could cause conflict

over the release of privileged or classified information acquired with the assurance it would be used for safety only.

Although the mandates of the department and of the courts are not the same, the difference does not necessarily imply a conflict of interest between the two. The Department of Transport has the responsibility to investigate accidents for the purpose of improving public safety. Although its purpose is not to lay blame for accidents, it is only natural and right that evidence gathered from detailed investigations should be used in the determination of blame. At the same time, it is the primary purpose of the courts to serve the ends of justice. It is towards those ends that civil courts, as a secondary purpose, make findings of blame and award damages. The Crown also has a responsibility to support the ends of justice, the law, and the courts. Therefore, employees of the Crown would appear to have a responsibility, in that capacity, to assist the courts in achieving a just resolution of a case whenever possible. It may be argued that, as a fundamental principle of law, the government should make available all appropriate resources (including its expertise) to assist the courts in rendering just decisions.

The Canadian Aviation Safety Board Act (Bill C-163, passed by the House of Commons on October 24, 1983) addresses specifically the use of information obtained in the course of an investigation. Section 23 reads as follows.

- 23.(1) On completion of any investigation by the Board of an aviation occurrence, the Board shall prepare and, subject to any restrictions in the interest of national security referred to in sub-section 13(3) and to subsection 13(4), shall make available to the public a report on its findings and wherever possible shall, in the interests of aviation safety, include in its report recommendations based on its findings.

Sections 29 (3) and 29 (4) state:

- (3) Regulations made under subsection (1) shall include rules for the protection of the identity of persons who report aviation occurrences under a voluntary reporting system and may include such rules in respect of a mandatory reporting system.
- (4) Notwithstanding any other Act or law, no person shall be required, in connection with any legal, disciplinary or other proceedings, to give evidence that could reasonably be

expected to reveal the identity of a person who has made a report to the Board pursuant to regulations made under subsection (1) where that identity is protected by rules referred to in subsection (3).

In a parallel situation, medical doctors often present expert testimony in civil actions. It is not the purpose of the medical profession to assist (or prevent) plaintiffs in claiming compensation. Nevertheless, the medical profession has recognized that its expertise is often essential for the just disposition of civil cases. It should be noted that the Canadian Medical Association's Code of Ethics states that physicians, when witnesses, have a responsibility to "assist the court in arriving at a just decision." The emphasis is on serving the needs of justice, not necessarily the pecuniary interests of clients.

While the Task Force is not convinced that the problem is one of conflict of interest, there may be an issue concerning the use of confidential information for such a purpose.

2. Use of Confidential Information

The Access to Information Act protects certain types of information from being revealed to the general public. There are specifically 54 statutes which contain such restrictive provisions. An example is Section 114 of the Unemployment Insurance Act (also discussed in Chapter 8) which reads:

Information, written or oral, obtained by the Commission or the Department of Employment and Immigration from any person under this Act or any regulation thereunder shall be made available only to the employees of the Commission or the said Department in the course of their employment and such other persons as the Minister deems advisable, and neither the Commission, the said Department, nor any of their employees is compellable to answer any question concerning such information, or to produce any records or other documents containing such information as evidence in any proceedings not directly concerned with the enforcement or interpretation of this Act or the regulations.
(1976-77, c. 54, s. 60.1)

3. Oaths of Secrecy vs. Compelled Testimony on Subpoena

The question has been raised as to whether or not the oath of secrecy an individual took at the time of his or her appointment to office is sufficient to permit that individual to be therefore not required to testify in court.

The question of whether an oath is legally binding on the person who has sworn it, or is binding in moral terms only, is of interest. It has been considered primarily in the context of whether the Oath of Secrecy which public office holders swear or affirm can be relied on sufficiently (and enforced through means of a restraining injunction where necessary) to safeguard confidential information in the post-employment period.

The issue received an extensive airing in England, in the Crossman Diaries Case in which the then Lord Chief Justice discussed a Privy Councillor's oath in the context of a former Cabinet minister publishing diaries disclosing confidential information acquired as a Cabinet minister, and considered whether there was power in the Court to restrain publication⁴. For a variety of reasons, the Court refused to grant an injunction restraining publication.

The attempt was made in the case to argue that the oath sworn by Mr. Crossman as a Cabinet minister would have been breached in the event of publication, although it was "not seriously relied on". Instead, said the Lord Chief Justice, "the Attorney-General must first show that whatever obligation of secrecy or discretion attaches to former Cabinet ministers, that obligation is binding in law and not merely in morals".⁵

This distinction between the morally and legally binding nature of an oath poses obvious problems for enforcement, if courts are prepared to hold that the obligation is binding "merely in morals" and not in law. It is worth noting the definition given recently by David M. Walker, Regius Professor of Law at the University of Glasgow: "An assertion or promise made in the belief that supernatural retribution will fall on the taker if he violates what he swears to do."⁶

4. Attorney-General v Jonathon Cape Ltd., (1975) 3 All E.R. 484.

5. Ibid., pp. 492-3.

6. David M. Walker, The Oxford Companion to Law (1980), p. 896.

The essential characteristic is that if the person taking the oath swears falsely he believes he has subjected himself to "some superhuman moral retribution". Discussion of this point in Wigmore in Evidence in Trials at Common Law (1976) attests to the supernatural influence attributed to the truth-telling efficacy of the oath.⁷ It is the supernatural sanction upon which the oath's primary effectiveness is based: "the essence of an oath is an appeal to a Supreme Being in whose existence the person taking the oath believes and whom he believes to be a rewarder of truth and an avenger of falsehood".⁸

The foregoing indicates why it was that Lord Chief Justice Widgery suggested in the Jonathan Cape case the oath has no strictly binding force in law. That does not mean that there are no potential legal consequences for the person who swears falsely. The Criminal Code is quite clear about the offences:

1. of perjury, viz., the person "who, being a witness in a judicial proceeding, with intent to mislead gives false evidence, knowing that the evidence is false" (sec. 120);
2. of false statements in extra-judicial proceedings, viz., the person "who, not being a witness in a judicial proceeding but being permitted, authorized or required by law to make a statement by affidavit, by solemn declaration or orally under oath, makes in such statement, before a person who is authorized by law to permit it to be made before him, an assertion with respect to a matter of fact, opinion, belief or knowledge, knowing that the assertion is false" (sec. 122); and
3. of offences to evidence in a judicial proceeding and to purported affidavits (secs. 124 to 127).

To the extent that the foregoing apply, potential criminal sanctions probably act as well as an inducement to truth-telling. In this respect, the views of Blackstone, in Commentaries on the Laws of England, on oaths of allegiance, are interesting.

7. Wigmore, Evidence in Trials at Common Law (1976), pp. 382-386 from VI.

8. R. v. Defillipi, (1932) 1 W.W.R. 545, 546 (Alta. C.A.).

He states:

The sanction of an oath, it is true, in case of violation of duty, makes the guilt still more accumulated, by superadding perjury to treason: but it does not increase the civil obligation to loyalty; it only strengthens the social tie by uniting it with that of religion. (authors' emphasis).⁹

The duration or term of an oath seems to be principally a function of the words of the oath itself. For example, the privy councillor's oath, (reproduced in Schedule D), includes an obligation to "keep close and secret all such matters as shall be treated, debated and resolved on in Privy Council, without publishing or disclosing the same or any part thereof," but contains no indication of how long that duty is to last. In the context of constitutional principles that place high importance on cabinet solidarity and on confidential dealings between ministers and the sovereign, this absence of chronological limitation and the applicability of the obligation to past proceedings and past ministers are hardly surprising.

(h) Sanctions and Penalties

It is important to determine whether, and which, sanctions or penalties constitute an effective deterrent or appropriate enforcement mechanism in conflict of interest situations.

Current guidelines for public officials on conflict of interest contain few specific administrative or legal sanctions. Compliance with ethical principles and standards is encouraged through disclosure, disqualification or divestment. Honour and personal choice are criteria which former officials are encouraged to use in determining the applicability of post-employment guidelines to their commercial activities.

Administrative sanctions, up to and including discharge of public servants are nevertheless applied by departments for violation of their codes of conduct. Governor-in-Council appointees, appointed 'at pleasure', can face similar disciplinary measures.

9. Blackstone, Commentaries on the Laws of England (New York W.E. Dean, 1846), Vol. 1, Bk. 1, p. 369.

The United States Ethics in Government Act (18 USC #207) specifies penalties of \$10,000 or imprisonment of not more than two years for violation of its provisions. Criminal enforcement of this Act is the exclusive responsibility of the Attorney General of the United States.

In the extreme conflict of interest cases, those caught by provisions in the Criminal Code, there are also serious penalties which can be levied against those found guilty of serious offences.

Beyond that, there are very vague administrative sanctions, as noted above, "up to and including discharge." A review of the disciplinary proceedings taken by Treasury Board from time to time revealed that these administrative sanctions are in fact applied.

The one other penalty in this area is that of publicity. The glare of publicity is a crude instrument with which to mete out justice, and can affect the innocent and guilty alike. Still, bringing to light wrong-doing cannot be ignored as a sanction, both as it applies to the parties involved and as a salutary influence on others. For elected public officials, the penalty of adverse publicity can be greater than any other sanction, since it can effectively bring an end to a career in public office.

Building the provision for publicity into a system of sanctions can also take the form of providing for routine disclosure of matters of unethical conduct. This is currently done where the decisions of arbitration boards are released following investigations of particular problems in the rendering of verdicts on them. Under the operation of the Office of Public Sector Ethics, as outlined in Chapter 13, the method by which the Ethics Counsellor makes public reports of his or her investigations can further this use of publicity as a penalty.

(i) The Relationship Between the Public and Private Sectors

A particular focus of the Task Force was the need to attract to government individuals of high calibre from all walks of life while ensuring that the public trust is, and is seen to be, safeguarded.

Much attention has been paid to the mobility of individuals between the public and private sectors since the report of the Task Force on Business-Government Interface: How to Improve Business-Government Relations in Canada in 1976 down to such recent publications as Linking Canada's New Solitudes, a report from the Conference Board of Canada in July 1983 on the Executive Interchange Program and business-government relations.

In the course of meeting with individuals from the private sector, we came to realize that a gulf exists between the public and private sectors in Canada which cannot be considered, broadly speaking, to serve the Canadian public interest. As you wrote in Canadian Business in August 1981, Prime Minister, "Canada's most famous novel ... Two Solitudes ... talks about cultural isolation of Anglophones and Francophones ... but another two solitudes exist -- business and government."

Businessmen and public servants do not know enough about each other or each other's environment. In the case of senior corporate officials, understanding of government structures is particularly important to conserve time which would otherwise be spent "probing" the structure to locate decision centres and to reduce uncertainties. Government ministers and officials should be as well informed as possible about how business operates.

The Task Force on Business-Government Relations in Canada recommends that:

- d) additional methods of bringing knowledgeable persons from the business community -- in part as an alternative to increasing the size of the public service -- should be explored systematically and used to supplement regular personnel management procedures. These methods would include more hiring by contract for specific term appointments; minimizing problems resulting from difficulties in transferring pension credits and security; etc.

Some existing government policies which hinder "interchange", such as conflict of interest regulations and the right of public servants to preferential considerations for job openings, should be reviewed to determine if their adverse impact on interchanges between government and business can be reduced for certain specified positions; and

- e) the present Career Assignment and Executive Interchange Programs should be expanded greatly to include officials from unions and assignment to non-profit research institutes and major business organizations. The feasibility of expanding the present limited exchange should also be reviewed.

The interchange idea is not new. The Conference Board publication in July 1983 examined half a dozen proposals regarding business-government personnel exchanges made since the mid-1960s, and observed:

There is a certain piquancy to these recommendations, for such a program already existed when all these statements were made -- the federal government's Executive Interchange Program (EIP). Though it was in place while all these recommendations were formulated, it was relatively little used by private firms compared to other approaches to improving business-government relations.

We spoke with several individuals who participated in the Executive Interchange Program, and the evaluation of its role and effectiveness was most positive. We also examined brochures describing the program of Interchange Canada (the federal program of personnel exchange) and the wording of the Interchange agreement to see its provisions with respect to conflict of interest. There are two types of Interchange agreements, one for participants from the private sector, a municipal or provincial government or a Crown corporation coming on a temporary basis to the public service of Canada, the other for a federal public servant on assignment to the private sector, a university, a municipal or provincial government, or a Crown corporation. In the latter, there is no reference to conflict of interest matters. Officers of Interchange Canada put a great deal of emphasis on conflict of interest when discussing interchange arrangements with managers in departments and with private sector managers. Apparently managers considering exchanges of personnel are aware of the potential for conflict and are quick to ensure there is none. Moreover, the employee on assignment to the private sector is still bound by his or her Oath of Office and Secrecy. There are no recorded incidents of conflict of interest problems where an employee has gone to the private sector on an interchange assignment.

With respect to the other type of agreement, governing individuals coming into the federal public service from the private sector, the following wording forms part of the contract:

It is agreed that the assignment shall be considered to be "employment" for purposes of the Official Secrets Act and _____ will be bound by Section 4 of that Act regarding wrongful communication of information, etc. It is also agreed that the Conflict of Interest Guidelines shall apply to _____ and that declaration of actual or potential conflict of interest shall be made prior to the commencement of the assignment.

The Personnel Management Manual, in the section dealing with Executive Interchange states that, "in selecting assignments for their executives, or before accepting executives on assignment, departments should satisfy themselves that security and conflict of interest are not significant risks inherent in the arrangement."

The federal program of personnel exchange appears to be working well, but only within a narrowly defined range. For instance, a sampling of 703 firms conducted by the Institute for Political Involvement showed that fewer than five per cent were involved with either the Executive Interchange program or its middle management counterpart, the Career Assignment Program. Another factor is that the program envisages temporary exchanges only, whereas we believe it is important, in terms of the general improvement of relations between the public and private sectors, to encourage people of ability from the private sector into government for a longer-term or on a permanent basis. Recruitment might also be made from the professional and labour organizations as well as the business corporations.

No single measure will remove the isolation between Canada's new "two solitudes". A range of measures, including the policies of government and the attitudes of opinion leaders in both government and the private sector, is necessary to bring about a change or improvement in this area. The present conflict of interest rules cannot be blamed for causing this problem, but they may be one of a number of contributing factors restricting movement of qualified people into the public service of Canada, in some cases. We are not saying that such rules should be eliminated, nor do we imply that those deterred from entering government are the kind of people who would have problems in conducting themselves ethically. The problem is more functional, having to do with the mechanical application of rules regarding divestiture of assets which have produced unnecessary hardship and financial loss in cases where there was no need to require divestment and excessive regulations on post-employment activities. The recommendations in this report are intended to help alleviate that particular problem.

CHAPTER 12

REFORMULATION OF THE RULES

(a) Overview

The current guidelines applying to ministers, ministers' exempt staff, Governor-in-Council appointees and public servants consist of a mixture of two elements: (1) what can be termed principles of conduct, and (2) procedures to minimize conflicts of interest, such as requirements for sale of assets, divestiture by way of trusts, disclosure and so forth.

We propose that the current guidelines applicable to ministers, ministers' exempt staff, Governor-in-Council appointees and public servants be replaced by:

1. A code of ethical conduct. This code would embody principles extracted from the present guidelines, redrafted to incorporate certain additional principles of conduct, and be binding upon all public office holders.
2. Procedures to minimize conflicts of interest. These procedures would be in the form of regulations made by Governor-in-Council. These procedures would be similar to those included in the present guidelines, such as prohibited activities, disclosure, and divestment of assets by sale or by trust arrangements. In reformulating procedures in the present guidelines for this purpose, they should be modified to give greater flexibility in administration, and applied on a functional basis. By "functional" we mean that the scope and content of the procedures would be related to the category and rank of the public office holder and, where practicable, reflect differences in the duties and responsibilities of public office holders.
3. Supplemental procedures. Whatever special rules are necessary to meet the particular conflicts experienced by various departments, Crown corporations and government agencies, they should be embodied in supplemental codes of procedures and rules appropriate to them.

These three would be a hierarchy, the code stating over-arching principles, the procedures establishing ways to comply with those principles, and the supplemental procedures

providing fine-tuning where necessary. All three must be compatible, the procedures and supplemental procedures being derived from the principles in the code. There should not be duplication among the three.

(b) Problems with Rules Expressed in "Guidelines"

Widely divergent views exist as to the binding effect of the current guidelines. Some take the position that the guidelines have the same force as law and must be obeyed while others hold the view that they are in English, "merely guidelines", i.e. they indicate the behaviour or practice that ought to be followed but are not as binding in their effect as a law would be.

This ambiguity of interpretation is as likely to occur to those thinking and working in the French language than in English, since the French equivalent of "guidelines" is "les lignes directrices", although this is not always the expression used. For example, the Governor-in-Council Guidelines employ "Lignes de Conduite" and the Public Servants' Guidelines "Normes de conduite". This simply argues further for our view that the expressions "guidelines" and "les lignes directrices" are best abandoned in any reformulation of the present rules.

In the case of present guidelines developed other than by Order-in-Council, such as those developed by specific departments and agencies, the binding effect may be even more open to question. However, as to a legal basis for such guidelines or codes, the authority to determine rules governing the conduct of employees in the public service is derived from section 7(1)(f) of the Financial Administration Act, which states that Treasury Board may "establish standards of discipline in the Public Service". Further, section 106 of the Public Service Terms and Conditions of Employment Regulations, made pursuant to section 7 of the Financial Administration Act, permits a deputy head to establish and administer standards of discipline, subject to any enactment of the Treasury Board.

Even so, problems of interpretation remain, primarily because the wording common to the guidelines or supplemental codes in a number of instances is hortatory, tending to indicate what should or ought to be done, rather than what must be done. In some respects, it is inevitable that rules in the realm of ethical conduct must be stated broadly, and we have already recorded our view that this is preferable to the route followed in several other jurisdictions of trying to particularize every conceivable problem and to deal with it by a specific rule. We do not dispute that it may be fairer for individuals to face rules precisely stated, and concisely limited, so that they can benefit from legal advice in the course of trying to interpret whether they have

violated the ethical code. Lawyers would prefer precise language, and several submissions were received from legal advisors in the Department of Justice and other federal departments concerning the need to avoid loose and ambiguous language so that people could understand clearly what their rights are.

This is not a new problem; a continuing dilemma exists because of the tension between two schools of thought: one emphasizing the legal rights of individuals and therefore favoring drafting laws as narrowly and precisely as possible, the other favoring an administrative rather than due process orientation and looking to broadly stated wording capable of interpretation in particular cases as they arise. This is all the more important in light of the Charter of Rights and Freedoms. We have borne this in mind, and try to strike the right balance. We favour a compromise between the approaches of legalism and pragmatism, as will be seen in the type of wording recommended for the code of conduct.

(c) Abstracting the Essential Provisions from the Present Guidelines

The present guidelines contain an amalgam of basic rules and procedures. The supplemental codes devised by various departments and agencies go further, and add to the basic rules and procedures that relate to ethical conduct, a variety of other instructions, rules, and various forms of advice.

While we can appreciate the desirability, from the point of view of public administration, of the Director of Personnel for a government department being able to hand a single booklet to a new employee, saying "Here, read this, it contains everything you need to know about the rules and procedures to be followed in this department," a comprehensive document may have two shortcomings. Some are so lengthy that they may never be read by employees, although we do not discount the utility of a reference handbook in times of need. Second, combining in one text matters ranging from Criminal Code provisions and guidelines for ethical conduct down to rules about punctuality and clothing tends to trivialize the more serious concerns.

We believe there is singular merit in separating from a general and comprehensive statement of all rules of conduct the few basic principles which can be said to be overarching and which establish the fundamental framework of ethics.

(d) A Code of Ethical Conduct

The Code of Ethical Conduct which we recommend is a distillation of the rules or basic principles developed over the past 10 to 15 years at the federal level. We recognize that

considerable time and effort has gone into their formulation, and we do not propose to discard either the nature or wording of those principles. However, in some cases we have blended earlier wording into shorter and more concise statements, and have made several additions to encompass new fields of concern which might properly be brought within the ambit of a general code of ethical conduct. In effect, we have blended the present wording of federal guidelines with the principles stated in Chapter 3 of this report which identify improper forms of conduct for those in government service and state principles which should govern in each case. The revised code follows.

CODE OF ETHICAL CONDUCT

Preamble

Service to one's country is a noble calling. Individuals holding public office, whether with great or modest duties, carry with them a portion of the responsibility for the destiny of our country and a part of the public trust which all Canadians vest in government.

The public trust rests on a belief and confidence that those in public offices will conduct themselves in an ethical fashion.

In furtherance of these precepts, the following principles shall be binding upon each public office holder.

Principles

1. It is by no means sufficient for those persons holding public office in Canada to act within the law. There is a further obligation to act in a manner that will bear the closest public scrutiny.

2. Any conflict between the private interests of public office holders and their official duties must be resolved in favour of the public interest. Upon appointment to office, and thereafter, public office holders are expected to arrange their private affairs in a manner that will prevent such conflicts of interest from arising.

3. Public office holders shall neither solicit nor, other than for incidental gifts or customary hospitality of nominal value, accept transfers of economic value from private sources, even though no bribery is involved. This principle applies where the transfer is discretionary as distinct from being pursuant to an enforceable contract or property right of the public official.

4. Non-elected public office holders shall not, without prior approval of their superior, step out of their official roles to assist private entities or persons in their dealings with the government where this would result in preferential treatment.

5. Public office holders shall not knowingly take personal advantage of or private benefit from information obtained in the course of their official duties which is not generally available to the public.

6. Public office holders shall not directly or indirectly use, or allow the use of government property of any kind, including property leased to the government, for anything other than officially approved activities.

7. Non-elected public office holders shall not engage in partisan political activities which impair the political neutrality, either real or perceived, of the public service.

8. Non-elected public office holders shall not express publicly their personal views on matters of political controversy, or on government policy or administration (apart from collective bargaining issues), where this is likely to impair public confidence in the existing or subsequent performance of their duties or which is likely to impair relations with other governments.

9. Public office holders shall not engage in personal conduct which exploits for private reasons or personal gratification their position of authority, or which would tend to discredit the professionalism of the public service.

10. Public office holders have a duty not to act, after they leave office, in such a manner as to cast doubt on the probity and impartiality of the governmental process or in any other way to diminish public confidence in the integrity of government.

This Code shall be binding on each public office holder. For purposes of this Code, a "public office holder" means officers and employees of Her Majesty in right of Canada, and for greater certainty, includes ministers; parliamentary secretaries; Governor-in-Council appointees; public servants; exempt staff members; officers, directors, or employees of federal boards, commissions, tribunals, Crown corporations and other agencies; officers and employees of the Parliament of Canada; and members of the Canadian Armed Forces and the Royal Canadian Mounted Police. "Non-elected public office holders" means all public office holders except ministers, parliamentary secretaries, and ministers' exempt staff.

(e) Procedures to Minimize Conflicts of Interest

We also recommend abstracting from the present guidelines those rules and procedures to be used to assist individuals to minimize the risk of conflict of interest, in keeping with the general principles stated in the Code of Ethical Conduct. The result would be called "Procedures to Minimize Conflicts of Interest," and could take the form of regulations made under the Ethics in Government Act.

We envisage the statement of these procedures being like much of the current content of the guidelines, dealing, for example, with such matters as divestment by certain groups (such as ministers and Governor-in-Council appointees), the use of trust arrangements, disclosure provisions, a description of assets exempt from divestment rules, and so forth.

The "Procedures to Minimize Conflicts of Interest" should not be thought of, we must stress, as a way of implementing the Code of Ethical Conduct. The Code, as enacted by Parliament, will by its wording be binding on the entire federal public sector, and each individual will have personal responsibility for ensuring that he or she is in compliance with the Code. It is not the duty of the Ethics Counsellor nor the Office of Public Sector Ethics to "enforce" the Code, nor their responsibility to ensure that everyone is complying.

Obviously, senior public office holders, such as ministers, deputy ministers, heads of boards and others, could not comply in certain respects with the general principles of the Code without in fact using the divestment procedures (in essentially the same way they do now).

We do not consider it within our terms of reference to recommend detailed procedures to minimize conflicts of interest to fit the circumstances of the wide range of public office holders. Our emphasis is on "approaches", as you requested in your letter to us, Prime Minister. Nevertheless, several suggestions are made which we trust will be considered when these procedural rules are reformulated.

First, we envisage that the Procedural Rules to Minimize Conflicts of Interest will be set out category by category, starting with ministers, then ministers' exempt staff, then deputy ministers and heads of agencies, then Governor-in-Council appointees, and so on through several classifications for the public service. This will make it easier for individual public office holders to readily locate the procedures applicable to them, will facilitate the development of procedures appropriate to their rank and classification, and is consistent with the functional approach we describe later in this chapter.

Second, the procedures should deal, as do the present guidelines, with such matters as the following.

1. The types of business, investment, professional or other activity considered incompatible with holding a public office of a particular rank or classification should be stated. This will indicate to each office holder the type of assets or activities which can reasonably be expected to create conflicts of interest, and which therefore should be divested or ceased (as the case requires) as a preventative procedure.
2. Assets and activities exempt from this preventive procedure should be described. Present guidelines, for example, provide detailed lists of exempt assets, and specify circumstances in which public office holders can continue to serve as officers and directors of private organizations and corporations of a philanthropic or educational nature. These are assets and activities not likely to give rise to conflicts of interest, and which therefore need not be encompassed by preventative procedures of divestment or cessation.
3. Various methods of divestment (such as sale of assets, or use of a trust) should be laid out, with explanations of which types are most appropriate given a public office holder's particular situation. More particularly, the types of trusts (frozen, blind, retention, or other) which are permissible in various cases, and the method for putting one's holdings in trust, including the duration of trusts, selection of trustees and filing of trust documents, should all be described.
4. A de minimis rule should be considered wherever appropriate, with respect to assets one should divest of, so that public office holders are not required to follow elaborate and sometimes expensive procedures in order to eliminate what sensible people would regard as a very minor potential or apparent conflict of interest.
5. Use of public disclosure as a technique for dealing with conflict of interest situations could be enlarged, and we recommend that it be resorted to in all possible cases.

6. Since it will not be possible to deal with all cases fairly and reasonably in the regulations, it would be appropriate to give some discretion with respect to operation and application of the procedures. The procedures for requesting an exemption from a rule in a particular case must be specified.
7. Where information about a public office holder's assets has been disclosed to a superior or to the Ethics Counsellor, on a non-public basis, procedures to ensure its confidentiality must be provided.
8. Where officials are required to disclose to their superiors offers of employment, the procedures and time limits for doing so must be specified.
9. The procedure for seeking and giving advice and guidance to individuals, departments or central agencies must be specified.

(f) The Functional Approach to Conflict of Interest Rules

As to the application of the "Procedures to Minimize Conflicts of Interest", we recommend a functional approach, by which it is intended that while all public office holders, regardless of rank, including ministers, should be subject to the same code of ethical conduct, any procedures they must follow to minimize conflicts of interest, such as sale of investments, disclosure, establishment of trusts and so forth should depend upon the nature of their duties and responsibilities in relation to their rank and classification.

By this test, all ministers should be required to conform to the most comprehensive of the procedures to minimize conflicts of interest since, whatever their individual departmental responsibilities, they are members of Cabinet and consequently participate in decision-making and share confidential information at the highest level on a collegial basis.

Application of the functional approach might seem to indicate that distinctions could be made amongst deputy ministers but, as decision-making in the federal government is now organized -- the widespread practice of interdepartmental discussions, the envelope system and so forth -- we recommend that the same scope of procedures to minimize conflicts of interest while in office should apply to deputy ministers as to their ministers.

It may be necessary to require certain other public office holders to follow the same comprehensive procedures as apply to ministers and deputy ministers because of the nature of their duties and responsibilities. Care should be taken, however, to avoid unnecessary procedures just for the sake of simplicity of administration. We reiterate the importance of fairness, simplicity and reasonableness.

Below the most senior levels of ministers and deputy ministers, the procedures for minimizing conflicts of interest should vary according to the duties and responsibilities of the public office holder. The more comprehensive those duties and responsibilities, for example, the more comprehensive the requirements to divest. The narrower the specialization of those duties and responsibilities, the narrower the scope of divestment.

This functional approach conforms with our view (explained in Chapter 16) that the members of the quasi-judicial agencies should be governed by restrictions clearly stated in the statutes that govern their operations, relating specifically to the industry or activity that they regulate. Thus, as the National Energy Act now requires, members of the National Energy Board must not hold securities of energy companies.

This approach also conforms with our views about Crown corporations and those appointed by the Governor-in-Council to executive positions in those corporations. Each Crown corporation operates in a different field and faces unique problems as well as common problems in relation to conflict of interest. All officers and employees should be subject to the code of ethical conduct and all Crown corporations should, as a minimum, live up to accepted standards of the private corporate world. Because they are in the public sector, however, they should in addition be requested to develop and submit for government approval specific rules about conflict of interest applicable to their officers and employees.

Within departments, below the rank of deputy minister, the functional approach already operates in principle, in that whatever divestment, or ineligibility for participation, may be necessary to avoid conflict of interest depends upon the private interests of the employee in relation to the duties he or she is required to perform. The responsibility is upon the employee to acquaint the deputy minister with his or her personal interests which might conflict with public duties and for the deputy minister to decide how best to minimize or remove the conflict.

With respect to exempt staff in ministers' offices, some of whom have access to Cabinet documents and participate in discussion of government policy, the more they know and the more they participate, the greater is the need for comprehensive

procedures for divestment. Conversely, we see little point in applying divestment requirements to ministers' constituency staff.

The functional approach could also apply to parliamentary secretaries, although we know, as former Cabinet ministers, that the responsibilities assigned and carried out by their parliamentary secretaries depend so much upon the practices of individual ministers.

Ambassadors, high commissioners and consuls general, although appointed by Governor-in-Council, should be treated, from the point of view of conflict of interest, as employees within the Department of External Affairs.

(g) The Rationale for Supplemental Codes

We reviewed earlier how, in 1973, Treasury Board invited departments and agencies to develop supplemental codes of conduct, to augment the general guidelines applicable to all public service employees in cases where a particular department or agency considered it appropriate. In considering a reformulation of the rules governing ethical conduct, we must now turn to these supplemental codes.

The rationale for supplemental codes springs from the reality that government is a multi-faceted operation, and that rules of general application can only be stated in broad overarching terms. To address the unique problems that arise in Air Canada, the Department of Agriculture, or the Department of Communications, specifically tailored rules are needed. Supplemental codes are an efficient mechanism in that detailed rules applicable to those inspecting aircraft, or analyzing crop yields, or handling the government's short-term investments obviously apply only to a small coterie of individuals within the overall government structure, and there is little point in having all of these detailed provisions contained in a single manual for the entire government.

A recent paper by H.L. Laframboise points out the inherent danger in the proliferation of service-wide controls and over-emphasis on conformity with centrally prescribed rules and policies which, he asserts, "have seriously damaged the free play of conscience and discretion in the value system of the federal public service. Managerial behaviour, as a consequence, now responds excessively to accountability to others, defined as 'dependent accountability', and insufficiently to individual conscience..."¹

1. H.L. Laframboise, "Conscience and Conformity: the Uncomfortable Bedfellows of Accountability," Canadian Public Administration, 26, No. 3 (1983), p. 341.

Some departments developed codes well in advance of the 1973 suggestion to do so but supplemental codes have developed chiefly since 1973. Schedule B lists, as far as could be ascertained, all supplemental codes now in existence, some 112 in number, including those of departments, agencies and Crown corporations. They are included with this report and also have been placed with the Assistant Deputy Registrar General where they may be consulted.

As to the nature of existing supplemental codes, three general observations are made.

1. Some supplemental codes are extremely brief, and do little more than adapt or summarize wording of relevant statutes, dealing with such matters as bribery, receipt of gifts, political activity and the like. These codes constitute, in effect, little more than a restatement of rules found elsewhere.
2. Other codes represent a considerable effort to devise additional rules appropriate to the department or agency, and to make them fit together as part of an overall manual to guide employees in their work.
3. As can be expected given the large number of authors involved, they are written in different styles, often employing different approaches to the subject, some being set in mandatory terms, others in hortatory fashion; some being framed in negative formulation as a series of "do's and don'ts", while others stress the importance of conducting oneself in a positive and professional fashion in carrying out public business. There is a great diversity in the terms, definitions and expressions used from one code to another.

The supplemental guidelines of the Departmental of External Affairs, the Department of Employment and Immigration, Office of the Auditor General, the Canadian Broadcasting Corporation and the Bank of Canada are examined below. Although the intent of all five appears the same in terms of eliminating actual and apparent conflict situations, there are major differences. They share two factors in common: all include supplementary guidelines with specific provisions applicable to the agency or department and all describe the procedure for disclosure of actual or potential conflict situations. Those of External Affairs and Employment and Immigration are similar in providing copies of the guidelines and explaining their legal basis, and supplying explanatory notes, examples of conflict

situations, notes on gifts, dress and political activity, and an explanation of application of the code to employees serving abroad.

The External Affairs code is the only one containing a caution regarding conflicts involving spouses and dependents. The CBC and Bank of Canada documents deal primarily with issues that are strictly conflicts of interest. While neither includes the 1973 guidelines which promoted them, paraphrased versions are the basis of both documents. These two sets of guidelines emphasize operation of the organization; they do not deal with employee conduct outside the realm of conflict of interest.

The two-part document of the Office of the Auditor General differs from the others. It deals first with employee professionalism and integrity, the objectivity required of auditors and the pursuit of excellence in government, addressing areas of conduct applying particularly to auditing functions. Secondly, it considers identification and avoidance of conflicts of interest indicating that employees are bound by the 1973 guidelines and spelling out how they apply. This is the only one of the five codes to mention restrictions applicable to post-employment activities.

Prohibited social invitations and reasonable exceptions are described by Employment and Immigration, while External Affairs stresses the need for objectivity by employees making recommendations or offering advice on the type and size of grants and contributions that may be made from public funds to national, international and other organizations or individuals. The document of the Office of the Auditor General asserts that "staff members who are public servants, first and foremost, work for the Office of the Auditor General of Canada. This takes precedence over any other working relationships." Secondary employment relating to government activities, directly or on behalf of a third party, constitutes conflict of interest and is not allowed.

One example of the type of matter which may in the future be dealt with in greater detail in a supplemental code is the use of government property. Principle 6 of the proposed Code of Ethical Conduct states that "Public office holder shall not directly or indirectly use, or allow the use of government property of any kind, including property leased to the government, for anything other than officially approved activities." To provide procedures whereby public office holders may understand and comply with this principle, it may be helpful to spell out particular rules in this regard where the general principle would not suffice. For instance, there are cases where government laboratories and testing facilities are sometimes required by individuals employed by the government to conduct scientific

testing or prepare reports in connection with giving expert testimony in civil litigation, for which they are remunerated separately by private sources. Without being able to use such facilities for testing, they may not have adequate documentation to adduce before the court in relation to the matter in which they have been called as expert witnesses. Problems such as this do exist in the public sector, and detailed rules in supplemental codes may be of assistance to all concerned.

To date, the government has not issued specific directions regulating the use of government property, supplies and equipment for other than official purposes, but several departments have formulated internal rules, and a few have chosen to include them in their supplemental codes of conduct. To illustrate such existing supplemental code provisions, three examples follow, each based on the underlying principle that the unauthorized use of government property is prohibited.

The Human Rights Commission rules on Use of Commission Property state: (1) The use of Commission premises, equipment and supplies for commercial enterprise for personal gain is prohibited; and (2) The unauthorized use by an employee of Commission premises, equipment and supplies for private purposes is not permitted.

Revenue Canada (Taxation) rules on Use of Government Property state: You must not use Government of Canada property or the services of another employee during working hours, at any time, for other than approved activities. All government property entrusted or issued to an employee must be reasonably protected and conserved; it must be surrendered on request by authorized departmental officials.

Royal Canadian Mounted Police rules on Use of Departmental Property state: (1) You are forbidden to use RCMP premises, equipment or supplies for the conduct of commercial activities for personal gain. (2) You are not permitted to use RCMP premises, equipment or supplies for private purposes unless authorized by your CO/director/head autonomous branch to do so.

Given the importance of having supplemental codes, and in light of our concern to make all rules relating to ethical conduct simple, fair and reasonable, we recommend that the existing codes fall appropriately to the Office of Public Sector Ethics. It is envisaged that, after the existing supplemental rules have been restated, the Ethics Counsellor will provide a draft to the deputy minister or head of the agency, at which time the latter can confirm that the reformulation is satisfactory for the purpose of the department or agency or, if not, he or she and the Ethics Counsellor can discuss and settle on appropriate wording.

As a result of this approach, all departments, boards, commissions and agencies which have supplemental codes will find they are operating under terminology and procedures that are the same. This will facilitate efforts to educate public servants about the appropriate procedures to follow, will simplify the procedures and make it easier when public servants move from one department to another. It will also be of greater assistance when deputy ministers move from one department to another, since they have primary responsibility for the code of conduct within their department, to find that the same terminology and procedure apply throughout the government.

It must be clearly understood that we do not envisage that the Ethics Counsellor will write the detailed rules for departments, in the sense of deciding what is right or wrong in terms of specific rules for ethical conduct; rather the Ethics Counsellor will simply assist departments and agencies to restate in a common format the rules which have already been developed by departments and agencies.

The ultimate responsibility for the text of the rules and for the administration would continue to rest upon the deputy minister or head of agency.

CHAPTER 13

FORMATION OF AN OFFICE OF PUBLIC SECTOR ETHICS

(a) Introduction

The central theme of our proposal is the formation of an Office of Public Sector Ethics.

We begin this chapter by reviewing the role of the Assistant Deputy Registrar General (ADRG), the Treasury Board and the Public Service Commission, to consider how the proposed Office of Public Sector Ethics can evolve from the present arrangements. We then turn to a detailed examination of the way the Office would be constituted, its role, and its relationship with others. The position of the person who would head this Office - the Ethics Counsellor is also considered.

(b) Present Role of the Assistant Deputy Registrar General (ADRG)

The Office of the ADRG was established in May, 1974. The ADRG is responsible for the administration of the federal government's policy on conflict of interest through the application of the various conflict of interest guidelines for ministers of the Crown, their exempt staff, and persons appointed to public office by the Governor-in-Council.

This Office is located in the Department of Consumer and Corporate Affairs. On May 9, 1974, the Treasury Board approved the required resources for the Office of the ADRG with a staff of 12 for the administration of the conflict of interest activity for those groups mentioned in the previous paragraph. (The ADRG is also responsible for the provision of the registration and issuance of documents required of the Registrar General of Canada in various Acts and Regulations, particularly the Formal Documents Regulations, and for the proper use and safekeeping of the Great Seal of Canada, the Administrator's Seal, the Privy Seal and the Seal of the Registrar General of Canada.)

On May 17, 1974, David R. Taylor was appointed the first ADRG. The Director, Standard of Conduct Advisory Group, G.J. Robert Boyle, joined the Office on June 3, 1974.

On assuming office, the ADRG took over the full responsibility for completing the arrangements that Cabinet ministers were making to comply with the Prime Minister's directive of December 28, 1973, regarding the Cabinet decisions relating to the implementation of the conflict of interest régime for ministers. The personal confidential files of each minister, that had previously been held in the Privy Council Office, were transferred to the ADRG. The first priorities, to complete the arrangements required for ministers, draft the guidelines for Governor-in-Council appointees and establish the operations of the Office of the ADRG, were met before December, 1974.

The major functions of the Office of the ADRG, therefore, are:

- to administer the conflict of interest guidelines applicable to Lieutenant-Governors, ministers, their designated exempt staff, Governor-in-Council appointees working full time and other individuals to whom similar guidelines are applicable;
- to advise and assist these individuals to arrange their personal affairs in a manner that complies with the guidelines in order that real or apparent conflict of interest between their private interests and the interests of the public is avoided;
- to provide the Prime Minister and ministers with the information they require to make decisions concerning conflict of interest matters;
- to ensure the effective administration of frozen trusts for which the ADRG is the trustee, and to provide essential financial information relating to these trusts to those who established them;
- to approve the trust agreements prepared by individuals holding public office to comply with conflict of interest guidelines when such individuals seek reimbursement of trust costs as authorized by government policy, and to approve such reimbursement by the department or agency;
- to operate a Public Registry which contains 'Conflict of Interest Statements' and 'Public Declarations' of individuals who are in compliance with the guidelines to which they are subject;

- to ensure that the Government's policy and guidelines on conflict of interest for Lieutenant-Governors, Cabinet ministers, ministers' exempt staffs, and Governor-in-Council appointees are complied with, and are not breached either through an oversight or otherwise; and
- to provide, as requested, advice and assistance to departments and agencies in preparing special or supplementary guidelines due to their special activities, and to review same to ensure that they are consistent with the government's policy on conflict of interest.

The specific activities of the Assistant Deputy Registrar General in furtherance of these primary functions include the following:

- implementing, applying and administering the government's policies and guidelines on behalf of the Prime Minister, and with extensive delegated authority, through the Clerk of the Privy Council;
- approving the conflict of interest arrangements made by Governor-in-Council appointees and ministers' exempt staff to whom guidelines are being applied and informing the minister responsible accordingly;
- seeking the approval of the Prime Minister after having satisfied himself or herself that the conflict of interest arrangements made by Cabinet ministers are appropriate;
- resolving difficult, sensitive or new issues that arise in the implementation of the conflict of interest policies or in the application of the guidelines;
- arranging for an independent auditor to review trusts administered by the ADRG in trust and report his or her findings to the Prime Minister and the Comptroller General; and
- keeping the Prime Minister and the Clerk of the Privy Council informed on the compliance of individuals subject to guidelines administered by the ADRG and on other conflict of interest matters.

In November, 1974, the guidelines for Governor-in-Council appointees were approved by Cabinet. Initially, senior appointees were asked to comply with the guidelines and subsequently other appointees such as ambassadors, high commissioners, consuls general and senior RCMP officers were asked to comply. On June 2nd, 1975, the Prime Minister requested that the ADRG prepare guidelines for members of ministers' exempt staff and administer them on his behalf. These guidelines, which are similar to those governing ministers, were approved on November 20, 1975 and staff members so designated by the ministers were asked to comply with them.

Over the past decade, the ADRG participated in the development of most of the policies and guidelines affecting appointed officials and public servants, including the guidelines for ministers of the Crown issued by former Prime Minister Clark on August 1, 1979 and by Prime Minister Trudeau on April 28, 1980.

In February 1982, further to a Cabinet decision, Treasury Board issued the new government policy on reimbursement of certain costs of trusts which assigned to the ADRG the responsibility for approving the trusts involved and the reasonable costs claimed.

The office of the ADRG currently comprises the Assistant Deputy Registrar General, the Director, Standard of Conduct Advisory Group, three senior advisors, one advisor, three secretaries, one clerk and one administration and trust officer.

On an ongoing basis, the arrangements of about 50 appointees are under negotiation, reaching close to 200 when a major cabinet shuffle occurs, and over 300 when there is a change of government.

The ADRG is responsible to the Prime Minister and the Clerk of the Privy Council for matters relating to conflict of interest and to the Deputy Minister of Consumer and Corporate Affairs for the administration of the Conflict of Interest Organization and for all matters relating to the functions of the Registrar General of Canada, i.e., the Minister of Consumer and Corporate Affairs.

(c) Present Role of the Treasury Board

With the exception of the administration of trusts delegated to the ADRG, the responsibility for administering the Conflict of Interest Guidelines for Public Servants rests with Treasury Board. This authority stems from the Financial Administration Act which states that Treasury Board may act for the Queen's Privy Council on all matters relating to personnel management in the public service, including the determination of

terms and conditions of employment of public servants. It further states that Treasury Board may establish standards of discipline and establish the financial and other penalties, including suspension and discharge to be imposed for breach of discipline or misconduct and that these powers may be delegated to deputy heads. Although the conflict of interest guidelines for public servants were passed by Order-in-Council, they are administered by the Treasury Board for application to the public service. (The only exception is that the ADRG has the authority to administer the trust provisions of the conflict of interest policy for public servants.) Their application in an operational sense has been delegated to deputy heads. The current practice is that departments and agencies deal with all problems of conflict internally and, if unsure of what stand to take, seek the interpretation and advice of the Treasury Board. Treasury Board will give its interpretation and advice, but for the most part, departments are encouraged to make their own final decisions.

Because the authority for dealing with conflict of interest situations rests with deputy heads (through delegation), the advice they receive from the Treasury Board is not binding. On the other hand, they can be held accountable for their actions and decisions.

The type of activity in which the Treasury Board is involved in this area are:

- advising departments on the handling of particular cases of conflict of interest which arise and political activity cases not covered specifically in section 32 of the Public Service Employment Act;
- interpreting the conflict of interest and post-employment guidelines;
- assisting departments in the development of supplemental codes;
- developing and establishing service-wide policy on matters of conduct in general including conflict of interest, public expression, personal harassment and service to the public.

(d) Present Role of the Public Service Commission

The Public Service Commission is at present responsible for dealing with those aspects of political activity governed by section 32 of the Public Service Employment Act. These include politically partisan activity at the federal and provincial levels by federal public servants. The section

contains specific prohibitions against certain types of activity as well as an indication of those activities which are permissible.

With respect to political activity, the Public Service Commission:

- advises departments as to the interpretation and application of section 32 and political cases not covered by section 32;
- publishes supplemental bulletins as required;
- examines applications from individuals and approves or rejects leaves of absence to become candidates in elections or to seek nomination as a candidate; and
- conducts inquiries into allegations of violation of section 32.

The advisory committee on post-employment for public servants, as established by Appendix IV of the Post-Employment Guidelines, is currently chaired by a Commissioner of the Public Service Commission.

(e) Elevation of the ADRG's Function into a New Entity with a Clearer Mandate, Broader Powers and Higher Profile

It is clear that the present role of the Assistant Deputy Registral General has evolved with the development of the guidelines over the past decade and reformulation of the guidelines now is required. We feel that a concomitant step should be a restructuring of the function carried on until now by the Assistant Deputy Registrar General.

Since we favour, in principle, the continuation of those procedures, although in a somewhat altered form and applied on a functional basis, there will continue to be a need for some official to perform the functions now performed - and in our opinion, performed well - by the ADRG.

We recommend that this be done by elevating this function into a new entity, a body or office which would have a clearer mandate, broader powers, and a higher public profile. This new entity, the 'Office of Public Sector Ethics' would absorb the functions of the ADRG, and certain ethical conduct functions now carried out by the Treasury Board and the Public Service Commission, but would have somewhat greater responsibilities and a degree of administrative discretion not possessed by the ADRG.

We recommend calling it "The Office of Public Sector Ethics" to indicate that it is concerned with ethical conduct and particularly with matters relating to conflict of interest throughout the public sector, including Crown corporations, which, while not part of the public service, are clearly within the public rather than the private sector.

Clearer Mandate. As is evident from the history of the Office, the Assistant Deputy Registrar General operates in an area of government to which no other similar responsibilities and duties have been assigned. This we believe has tended to obscure his or her mandate with respect to conflict of interest matters - if not within the upper echelons of government, then at least in the general public perception.

Broader powers. The effective operation of an Office of Public Sector Ethics as the central focal point in the entire federal government effort to address matters of conflict of interest requires that the Ethics Counsellor have powers and authority commensurate with this task. The broader powers which should be given to the Ethics Counsellor will come about in two ways. Those powers already enjoyed by the Assistant Deputy Registrar General, the powers vested in Treasury Board, and the powers vested in the Public Service Commission with respect to matters of ethical conduct in the public service will be drawn together. Certain of these existing powers will be consolidated in the Office of Public Sector Ethics. Secondly, new powers will be added by the Ethics in Government Act, including the Ethics Counsellor's authority to conduct investigations upon request, and his or her mandate to perform an educational role with respect to ethical conduct in the public sector.

Higher Public Profile. It is also clear that the policy of the government in developing guidelines for conflict of interest, and arranging for their administration by the Treasury Board with respect to the public service, and by the Assistant Deputy Registrar General with respect to all others subject to the guidelines, was to handle the matter efficiently but quietly. In short, a low profile was chosen.

It became clear to us from our inquiries that this approach has not been successful: many people are unaware of the nature or role of the Treasury Board or the ADRG in this area and are not adequately informed as to the rules governing ethical conduct. While this is true in many cases within the government, it is manifestly so with regard to the public at large. We recommend that the Ethics Counsellor be so positioned as to have a high public profile - much of which will arise from his or her educator's role in matters of ethical conduct. An important advantage of such an elevated office lies in its actual and

perceived impartiality and freedom from political or bureaucratic bias. Its creation would be seen as emphasizing the government's willingness to air its problems in public and thus lend increased credibility and objectivity to investigations of alleged wrongdoing by public officials. By focusing all conflict of interest and related matters in one place, after all efforts to resolve such issues have been unsuccessful, the Office of Public Sector Ethics would fulfil a necessary role in establishing jurisprudence in this area.

(f) Ethics Counsellor

The head of the Office of Public Sector Ethics should, we recommend, be called the "Ethics Counsellor". We further recommend that the incumbent of this position be a senior and experienced individual with a widely recognized reputation for integrity who, by his or her stature, would maintain the dignity and authority of this position as someone in whom the government, the public service, the opposition parties, the media and the general public could repose the utmost confidence. While we do not suggest that such a person need have legal training, we propose that he or she have the stature of a high court judge.

(g) Size of the Office

As stated in Chapter 1, our recommendations, if adopted, would not likely result in any appreciable increase in the bureaucracy or the costs of administration. The size of the Office of Public Sector Ethics would not be much larger than the current operations of the Office of Assistant Deputy Registrar General which has a staff of 12.

(h) Structure and Organization of the Office of Public Sector Ethics

In order to maintain the greatest degree of independence, the Ethics Counsellor should be appointed by Order-in-Council. It is considered that the staff of the Office of Public Sector Ethics should be engaged pursuant to the Public Service Employment Act.

(i) Functions of the Office of Public Sector Ethics

The Office of Public Sector Ethics, under an Ethics Counsellor, would have four functions:

- (1) advisory,
- (2) administrative, (including authority to waive),

(3) investigative, and

(4) educational.

(1) Advisory - One of the roles of the Office will be to advise with respect to application and enforcement of the rules of ethical conduct in the public sector.

We see this role as being performed on three main fronts: The Ethics Counsellor would act as an advisor to the Prime Minister, ministers and deputy heads of departments and agencies with respect to the rules and procedures applicable both to those who report to them and, where applicable, those who are appointed by them. First, the Ethics Counsellor would advise the Prime Minister, in respect of ministers, his own exempt staff, Governor-in-Council appointees and parliamentary secretaries. Secondly, the Ethics Counsellor would act as an advisor to ministers with respect to their exempt staff, their assigned parliamentary secretary and the Governor-in-Council appointees who report to them. Thirdly, the Ethics Counsellor would act as an advisor to deputy heads of departments and agencies with respect to public servants and Governor-in-Council appointees who report to them.

In addition to the kinds of advice now offered by the ADRG, we recommend that the Office of Public Sector Ethics be consulted extensively in the formulation of the procedures to minimize conflicts of interest at all levels, including the supplemental rules of departments, agencies and Crown corporations, so as to ensure simplicity and fairness throughout the public sector.

While such advice might be given informally on occasion, written requests would likely be received by the Ethics Counsellor from these three sources requesting an interpretation of certain principles or procedures. Where interpretations emanate from a single source, a common body of "jurisprudence" or interpretation would be developed and would apply throughout the federal public service.

With respect to the public service, a deputy head of a department or agency could, at any time, consult the Ethics Counsellor on matters of ethical conduct. Because the deputy head has delegated authority to deal with conflict of interest matters and their resolution, he or she would not be obliged to accept the advice of the Ethics Counsellor just as he or she is not now obliged to accept the advice of the Treasury Board on such matters.

The existence and the role of the Office of Public Sector Ethics would not create an extra step in the present system. The new Office would become the central repository of knowledge, expertise and experience in its area of responsibility and would be turned to for advice by the Prime Minister, ministers, deputy ministers and heads of government agencies and Crown corporations on ethics-related matters.

(2) Administrative - Closely related to its advisory function would be its administrative functions. Like the ADRG, the Office of Public Sector Ethics would administer the procedures, i.e. it would assure that they are followed by those to whom they apply and would offer appropriate guidance. The Ethics Counsellor would stand ready, as the ADRG does now, to act as trustee of frozen and retention trusts.

One of the serious weaknesses of the present guidelines lies in the absence of a de minimis rule to ensure that common sense can be applied when dealing with minor conflicts of interest of public office holders, and the absence of a way to give former office holders an opportunity to prove that their post-employment activities do not offend the spirit, even though they may seem contrary to the letter of the rules. If our proposals to remedy this weakness are accepted, the Ethics Counsellor should be given the necessary authority to implement them.

With respect to the declaration or filing of trusts to be established and administered, and assistance for those assuming public office in their endeavour to comply with the disclosure and divestiture rules, the Office of Public Sector Ethics would continue to perform administrative functions currently done by the Assistant Deputy Registrar General's Office.

(3) Investigative - In certain cases, it would be in the public interest to have the Ethics Counsellor investigate allegations that the Code of Ethical Conduct has been breached, or the procedures for minimizing conflict of interest have not been followed. We recommend, therefore, that investigative powers be given to the Ethics Counsellor to be exercised at the request of the Prime Minister, minister or head of department or agency, as the case may be. The Ethics Counsellor would not be empowered with investigative powers on his or her own initiative.

A basic problem with the present arrangements is the absence of a process whereby allegations of conflict of interest can be investigated properly and the situation brought to a definitive conclusion. This is a contributing factor to public cynicism about ethical conduct in government. If matters, once raised as allegations, are never conclusively dealt with, the general public interest is not served and individuals about whom

allegations were made may not find that they were fairly dealt with or satisfactorily acquitted, as the case may be.

Consider for example the case of allegations that could be made against a particular Cabinet minister in relation to ethical conduct or specifically relating to a conflict of interest. In some instances, these may be allegations arising out of the heat of partisan debate, without any real foundation. In other instances, there may be significant evidence of impropriety or wrongdoing. It will rest with the Prime Minister, as it always has, to decide when to take such matters seriously. In those cases where there seems to be cause for genuine concern, the Prime Minister could refer the matter to the Ethics Counsellor for investigation, thus placing the matter in an appropriate forum for thorough review, and giving all interested parties an opportunity to be heard as the Ethics Counsellor proceeds with an investigation.

We do not suggest that the present watchdog roles of the opposition parties in Parliament and the media should be changed. The only thing proposed is the addition of a new element whereby, in those cases where the allegations clearly warrant an investigation, (not a criminal investigation which is the responsibility of the RCMP), the option be available to the authorities to have the Ethics Counsellor look into the matter and make a full report.

A Cabinet minister could refer a matter to the Ethics Counsellor for investigation when his or her parliamentary secretary, a ministerial appointee or a member of his or her exempt staff violates, or appears to violate, the code of ethical conduct, or fails to follow procedures to minimize conflicts of interest. All of the considerations and procedures outlined above with respect to investigations initiated by the Prime Minister with respect to ministers would apply in the case of a minister requesting an investigation of a member of his or her staff.

When investigations are initiated in respect of a member of the public service, somewhat different considerations apply. First, we recommend that primary responsibility for enforcement and administration of the code of ethical conduct within a department or agency of government continue to rest with the deputy minister or head of the agency under delegated authority from the Treasury Board. All of our recommendations with respect to ethical conduct can be fitted into this existing context. As at present, the decision to investigate any matter involving ethical conduct of an employee will be made in the department or agency concerned. If the matter is so serious as to warrant police investigation, this would be carried out in exactly the same fashion as it is at present. The only difference is that for

matters relating to ethical conduct rather than criminal behaviour which a deputy minister or head of an agency wishes to have investigated on a somewhat more arm's length basis, the deputy minister or head of agency should be able to turn to the Ethics Counsellor.

We have already discussed how the Prime Minister, ministers, and deputy ministers and heads of agencies can initiate an investigation by the Ethics Counsellor. The further question is whether the Ethics Counsellor on his or her own should have the authority to initiate inquiries into allegations. It would not seem appropriate for the Ethics Counsellor to investigate alleged conflicts of elected officials of his or her own accord. In the case of public servants, the case of an alleged conflict might best be referred to the deputy head concerned for his or her decision on how to proceed.

Some examples of investigative roles of other bodies are worth considering in this context. In the Department of National Defence, when an accident or any other situation requires investigation, a special board of inquiry is convened. The National Defence Act gives certain persons within the department the authority to convene such boards whenever necessary. Individuals are chosen to serve in this capacity based on the type of knowledge, skills, rank and disinterestedness necessary to conduct the investigation. For every board of inquiry that is convened, the members are hand-picked by the convening authority.

We also note the interesting parallel with the Canadian Judicial Council. In addition to conducting inquiries or investigations at the request of the Attorney General of Canada or a provincial Attorney General, the Judicial Council may, as authorized by the Judges Act, institute its own investigations into allegations of misconduct by judges. It might be argued that, in the same way, the Ethics Counsellor should have such a power.

However, the scope of investigations by the Judicial Council is limited in that the group potentially subject to such investigations is relatively small. That is not the case with respect to public office holders, and to open up a broad right for the Ethics Counsellor to investigate any allegation raised by anyone with respect to an individual or matter in the public service of Canada is too sweeping a proposal, at least at this stage. It may be that after some years of experience and operation of the Office of Public Sector Ethics, this power could be added to those granted to the Ethics Counsellor.

Our terms of reference requiring us to make recommendations consistent with the traditions of Canadian parliamentary democracy also led to this conclusion. We believe

that it would not be in keeping with the tradition of responsible government to have those directly accountable for the actions of the departments of government subject to "outside" investigations instigated for whatever reason. Nor are we unmindful of the fact there are already in place law enforcement procedures to deal with any incidents of individuals breaking the law, and that such matters would continue to be dealt with in the future as they have been in the past.

Still another point to consider is the little known fact that the Canadian Judicial Council under section 42 of the Judges Act is empowered to make investigations of allegations involving conduct of individuals appointed "to serve at pleasure" pursuant to any Act of Parliament. This avenue of investigation (discussed at greater length in Chapter 16 in the section dealing with "Rules Governing Judges and Quasi-Judicial Bodies") currently exists in law and must be recognized as part of the resources available to the government in dealing with matters requiring investigation.

(4) Educational - One of the reasons we have stressed the need to simplify the rules which govern ethical conduct is to make them easier to understand. Tied directly to this is the need for a more effective educational program throughout the federal public service about the rules and their applications.

An atmosphere must exist which stresses the importance of ethical conduct, in order to maintain the appropriate climate within which those working in the public sector act and make decisions. The larger the public service, the more important this becomes. Appropriate to it, therefore, is a general consciousness-raising on the part of all public officials and employees about the nature and application of the rules for ethical conduct and the procedures for minimizing conflicts of interest. Very often this amounts to simple and practical considerations, such as knowing to whom one should turn to discuss a troublesome matter, or how to go about seeking clarification and resolution when one is placed in a compromised position. In this connection, we have been impressed by a number of the methods used by the Office of Government Ethics in Washington to carry out a year-round educational program, involving seminars, publication and distribution of brochures, use of video tapes, and an annual conference for personnel officers or others in each department responsible for matters of ethical conduct.

(j) Access to the Ethics Counsellor

To summarize, the Ethics Counsellor may be approached by:

- i) the Prime Minister in respect of any matter and in particular on matters of unethical conduct on the part of any member of his own exempt staff, minister, parliamentary secretary or Governor-in-Council appointee;
- ii) ministers in respect of their own private affairs and their exempt staff, assigned parliamentary secretary and those Governor-in-Council or ministerial appointees who report to them;
- iii) deputy heads of departments and agencies in respect of their own private affairs and their own departmental or agency staff including any Governor-in-Council appointees; and
- iv) the Chief Executive Officers of Crown corporations in respect of their own private affairs and their staff.

It is intended that the Ethics Counsellor will be empowered to investigate alleged conflicts of interests involving ministers, their exempt staff, parliamentary secretaries, Governor-in-Council appointees and public servants. It is considered appropriate, therefore, based on the sensitive and complex nature of the subject, that anyone in any of these categories be permitted to approach the Ethics Counsellor with a problem or a complaint.

The Commissioner of Official Languages accepts complaints directly from individuals (and is required by legislation to do so) without prior channels having been explored.

The Human Rights Commission operates similarly except their legislation requires that any and all other redress mechanisms available to the complainant be exhausted before an investigation is undertaken. Although it might seem desirable for individuals to follow the chain of command, there are some situations when it would not be appropriate to do so. For example,

- an individual may wish to advise the Ethics Counsellor of an existing conflict situation which involves his or her superior, or
- an individual may wish to report a situation but remain anonymous.

Public Service Considerations

Additionally, the question has been raised as to whether individual public servants should have access to the Ethics Counsellor. We believe it would not be appropriate for the Ethics Counsellor to inquire into alleged misconducts involving public servants which have been brought to his or her attention by public servants. Equally important would be the opportunity for public servants to consult the Ethics Counsellor as to whether certain activities are in fact unethical. Consultation could of course take the form of discussion of hypothetical cases. Providing such an opportunity would help to deter unethical conduct by those whose activities might be reported; it would also help to eliminate the "everyone is doing it" justification for unethical behaviour. Notwithstanding these concerns, it is our view that an overriding consideration is the need to maintain intact the structures and procedures as now developed in departments and in accordance with general principles of Canadian public administration.

Where individual public servants wish to bring matters relating to unethical conduct to the attention of their superiors within the department, there are ways to do so and channels through which to proceed. Therefore, we recommend that individual public servants not have direct access to the Ethics Counsellor.

When a situation of conflict is found to exist, the deputy head has been delegated authority to take disciplinary action. Employees have the right of redress for such action through the grievance system. If an employee grieves, the grievance may be considered at a number of different levels within the department, the final one being the deputy head. If the employee is still not satisfied that the grievance has been appropriately considered (and the grievance relates to a financial penalty, a dismissal or an interpretation of a collective agreement), the case may then be put before the Public Service Staff Relations Board. Ultimately the case could be elevated to the Federal Court and depending on the situation, to the Supreme Court. It should be noted that a decision taken on a grievance at any level in this process can be overturned by the next higher level. It would be most appropriate for this procedure to continue as it has been functioning well for many years.

The ultimate impact on the public service of the Office of Public Sector Ethics would be that an additional body of knowledge could be tapped on an as-required basis for advice and discussion.

(k) Status of the Reports of the Ethics Counsellor

If members of the House of Commons press the Prime

Minister to initiate an investigation of an alleged conflict of interest involving a minister, it is likely that there would be a great demand for the resulting report of the Ethics Counsellor to be made public. Indeed, this would seem appropriate.

In a case involving a public servant, however, no public attention may have been attracted and, therefore, there would be no need to divulge the results publicly. For example, if a deputy head requested that an investigation be conducted in his or her department, then the final report should be made to the deputy head and no one else. Similarly, if a minister requested that an inquiry be made into certain activities of a member of his or her exempt staff, then the final report would be made only to the minister.

The important thing, for the Office of Public Sector Ethics to maintain credibility, is that a report always be made to the person(s) who originally requested it.

We considered carefully whether the Ethics Counsellor's report with respect to a matter involving a Cabinet minister should be made to the Prime Minister, who would have the option of tabling it or not, or whether the Ethics Counsellor's report should be made public by the Ethics Counsellor. We prefer the latter course. Otherwise, the Prime Minister remains part of the problem rather than becoming part of the solution. The idea is to have a clear cut and arm's length procedure for investigating and reporting on serious allegations of unethical conduct and breach of rules of ethical conduct. We do recommend that the Ethics Counsellor make his or her report available to the Prime Minister in advance of making it public (so that the Prime Minister may be in a position to act on the findings in the report on a timely basis) but that the Ethics Counsellor will retain the right, and indeed have the duty, to make public his or her report pertaining to a minister. We are persuaded that this is an acceptable procedure. Nothing obliges a Prime Minister to refer a matter to the Ethics Counsellor for investigation. The Prime Minister himself or herself will decide whether the matter is serious enough for him or her to ask the Ethics Counsellor to investigate, with all the consequences that necessarily follow.

(1) Relationship Between the Office of Public Sector Ethics and the Central Agencies (Treasury Board and the Public Service Commission)

There remains the question of how the advisory function of the Office of Public Sector Ethics would link with the advisory functions of the Treasury Board and the Public Service Commission which are currently in place. These relationships need to be well established and clearly defined at the outset.

The Public Service Commission is currently responsible for two areas relating to ethical conduct. First, they set all policy and give advice on the subject of political activity within the realm of section 32 of the Public Service Employment Act. Since it is proposed that section 32 be removed from that Act and be put under the jurisdiction of the Office of Public Sector Ethics, it would appear that there would be no future requirement for Public Service Commission involvement in this area. Because the role of the advisory committee on post-employment for public servants would be assumed by the Office of Public Sector Ethics, there would be no further need for Public Service Commission involvement here either.

The Treasury Board Secretariat is currently responsible for setting policy and giving advice in the area of conflict of interest and standards of conduct for public servants. Conflict of interest, as a matter of personnel policy, should continue to be administered by the Treasury Board. When there is a breach of the conflict of interest guidelines by a public servant, that individual is subject to disciplinary action, which is also a matter of personnel policy. It would seem reasonable to keep the two together. If such were not the case, it would be necessary for the Office of Public Sector Ethics to provide an advisory and interpretive service to all departments of the public service.

This being the case, there would be two sources of information available to a deputy head who wished to consult on a question of ethical conduct. Clearly the deputy head has the choice to go to one source or the other or to both. It will be necessary for the Ethics Counsellor and the Personnel Policy Branch of Treasury Board to consult closely to ensure that consistent advice and guidance are being given and that the two bodies agree on the standard of ethical conduct that should be maintained in specific cases. There will be considerable contact in the early stages of the establishment of the Office of Public Sector Ethics to formulate understanding of the division of responsibilities and how they intersect.

Although the Treasury Board currently maintains the policy on post-employment for public servants, it has no authority to apply the guidelines to individuals who have left the public service. Those who have left and wish to obtain advice would, under the present system, be advised to approach the advisory committee on post-employment.

Taking into account the responsibilities of the Office of Public Sector Ethics outlined in section (i) of this chapter, and the desirability of maintaining, as far as possible, the present structures and systems for dealing with ethical conduct in the public service, the final division of responsibilities for the various dimensions of ethical conduct would be as follows.

Conflict of Interest

The Office of Public Sector Ethics would be responsible for the establishment of policy as per the Ethics in Government Act; the administration of the policy and any accompanying procedures for ministers, ministers' exempt staff, parliamentary secretaries and Governor-in-Council appointees; and for giving advice to these groups, as well as administration of the policy and any accompanying procedures for public servants insofar as the establishment and maintenance of trusts are concerned.

Treasury Board would continue to be responsible for the administration of the policy and procedures for public servants, including giving advice and guidance to departments.

Post-Employment

The Office of Public Sector Ethics would be responsible for establishing policy as per the Ethics in Government Act; for the administration of the policy and any accompanying procedures for ministers, ministers' exempt staff, parliamentary secretaries, Governor-in-Council appointees and public servants; for giving advice and guidance as requested; and for considering cases for exemption.

The Treasury Board would have no need for involvement in this area other than to ensure that all public servants to whom the post-employment guidelines apply are made aware at the time of appointment of their obligation to abide by them.

Public Comment

The Office of Public Sector Ethics would be responsible for the establishment of policy as per the Ethics in Government Act and for the giving of advice to Governor-in-Council appointees. Because the Treasury Board would have no further role in this subject area, the Ethics Counsellor would provide operational advice to departments on this subject.

Political Activities

The Office of Public Sector Ethics would be responsible for the setting of policy as per the Ethics in Government Act and for the giving of advice and interpretation. Because the Public Service Commission would have no further role in this subject area, the Ethics Counsellor would provide operational advice to departments on this subject.

Deputy heads would continue to apply and enforce the government's policies in their departments and agencies for conflict of interest, post-employment and political activities.

(m) Relationship with Crown Corporations

The interaction between the Office of Public Sector Ethics and Crown corporations is discussed in Chapter 17.

(n) Annual Reports

In order to give Parliament an opportunity to discuss the work of the Ethics Counsellor and his or her Office, it is recommended that like other agencies of government the Ethics Counsellor prepare an annual report which the Prime Minister would place before Parliament. We also recommend that the Prime Minister, at the same time, report to Parliament any action taken or any penalties imposed with respect to failure on the part of public office holders to observe the rules of conduct or the procedures, or any charges laid against public office holders under the Criminal Code or other statutes.

CHAPTER 14

RULES TO GOVERN

THE POST-EMPLOYMENT PERIOD

(a) Introduction

We have had no hesitation in recognizing the necessity and desirability of requiring incumbent public office holders to observe principles of conduct and procedures designed to minimize conflicts of interest. We have struggled long and hard, however, over the question as to what, if anything, should be done or can be done to restrict the activities of former office holders.

It is significant that nearly all the representations made to us in writing and at interviews included reference to the post-employment question, and almost without exception they were critical of the existing guidelines.

We note in this context that in the United States, prior to passage in 1978 of the Ethics in Government Act, very little information was available as to the effects of post-employment restrictions on the recruitment and retention of government personnel. "It has been argued, not without merit," notes one U.S. writer on this subject, "that in the absence of such data, it is impossible to analyse the costs and benefits of the laws in anything other than general terms."¹

A similar observation could well be made in the Canadian context, with respect to application of the Conflict of Interest Guidelines during the past decade. To gather information on the guidelines' effect on post-employment and recruitment matters, we discussed application of the guidelines with government officials in the Privy Council Office responsible for their administration. Written and oral submissions were received from many individuals subject to these post-employment guidelines. We reviewed the implications of the present policy with several prospective public office holders who are currently assessing the guidelines in relation to a possible move into the public sector, and gathered statistical data on such matters as the number and types of trusts which have been established.

1. Morgan, Appropriate Limits on Participation by a Former Agency Official in Matters Before an Agency, 1 Duke L.J. 29 (1980).

We do not consider our research efforts to have been rigorously scientific, but on the other hand, they have been more than merely impressionistic. In general terms, we conclude the current post-employment guidelines create unnecessary problems in a large enough number of cases to affect adversely the government's ability to recruit able personnel.

(b) The Nature of the Post-Employment Problem

The term "post-employment" refers to a problem facing government, not the individual, although it is true that any improper or unethical conduct in this area relates directly to things which an individual may do. The reason it is primarily a problem for government is because "post-employment" refers, not to the fact that the public office holder has now retired, but relates rather to an office holder moving out of government into the private sector, and continuing to be actively employed there. There is little real concern about "post-employment" when the individual simply retires, or moves to a provincial or other level of government to work, returns to the federal government in some other capacity, or perhaps takes up a teaching position at a university. The only difficulties that might arise in these cases would be in situations where the individual makes investments based on confidential information not available to others or proceeds to otherwise use information, such as in writing or teaching, for remuneration and the information being conveyed is of a confidential nature.

The principal concerns, as we understand them, which justify placing restrictions on the activities of public office holders when they leave office are that: (1) public office holders while still in government may have used their offices to advance their prospects for private employment when they leave office; (2) former public office holders may have privileged access to those still in government; (3) former public office holders may receive preferred treatment in their dealings with government; and (4) private employers may obtain competitive advantages because of special knowledge, use of confidential information, or presumed influence with the government when they employ or appoint former public office holders as directors or officers.

Our view is that, upon departing from government, an individual takes two kinds of information: first, information which is general knowledge of the structure, nature, operations and personalities of government, in short, information about how government works; and second, privileged and confidential information about pending policy, facts not yet generally disclosed to the public, and inside and sensitive information about private sector entities which the government regulates. In our opinion (and in the opinion of many with whom we spoke)

transmission of the first type of information to the private sector is clearly in the public interest. It is the second type of information which requires protection, and, therefore, it is appropriate to have rules to govern those who possess it.

(c) The Basic Principle and its Functional Application

In the Code of Ethical Conduct, principle ten states that: "Public office holders have a duty not to act, after they leave office, in such a manner as to cast doubt on the probity and impartiality of the governmental process or in any other way to diminish public confidence in the integrity of government."

In the Procedural Rules to Minimize Conflicts of Interest, to be enacted as regulations under the Ethics in Government Act, we recommend that detailed provisions be developed to give former public office holders and incumbent public office holders guidance in interpreting and applying this principle. In Chapter 3, we concluded our introductory discussion of post-employment by stating that: "Within certain narrow and stipulated limits of time and degree of connection with their former responsibilities, former public office holders should otherwise be free to assist private entities or persons in their dealings with government." In our view, the Procedural Rules to Minimize Conflicts of Interest should specify those limits of time and degree of connection, in much the same way that the current post-employment guidelines endeavour to do. Before making recommendations as to these "stipulated limits", we wish to make some general observations about guiding principles or rules-of-thumb in this difficult area of "post-employment".

Six basic points or concepts need to be taken into account in developing procedural rules to apply principle 10 in the Code of Ethical Conduct.

First, the best time to deal with conflicts of interest arising out of post-employment is before the public office holder leaves office when preventive steps of an anticipatory nature can be taken (such as having the public office holder agree to restrict his or her post-employment activities in certain ways following government employment).

Second, rules about dealings between the government and former office holders can, generally speaking, be more effectively enforced against present public office holders who can be held directly accountable and disciplined, than against former public office holders. Under the present rules, at least, there is no easy way of directly disciplining former public office holders. Another problem, which is the other side of this coin, is that under the present arrangements, former public office holders accused of breaching the guidelines cannot readily defend

themselves against allegations of misconduct, except through the media, which is not necessarily the most appropriate forum for this purpose.

Third, any "cooling-off" period after leaving public office and entering private employment should be related to the particular circumstances of one's position while in government, and should not impose unnecessary hardship on former public office holders, be they elected or appointed. In short, the more that the rules in this area can be particularized, or drawn with specific concerns or problems in mind, the less likely they will be to produce unfair results than would highly generalized rules of broad application.

Fourth, interchange of personnel between government and the private sector, in both directions, should be encouraged so that government can take advantage of business experience and the private sector can operate with a better understanding of the workings of government. However, measures must be taken to ensure that the prospect of private employment does not affect the decisions of public office holders, and that particular businesses do not gain an unfair advantage over their competitors by employing former public office holders who possess and are prepared to disclose up-to-date information about those competitors.

Fifth, authority should be available to permit former public office holders to take employment in those cases where, on the basis of an application for a waiver or modification of the "cooling-off" period, a senior officer with authority (such as the Ethics Counsellor), can be satisfied that no conflict of interest would exist.

Sixth, rules which proscribe post-employment activities should be drawn up with much greater specificity, to enable those who leave government to have a clear idea of what they can, and cannot, do. This is valuable not only to the former public office holder but also to his or her new private sector employer and to those in government with whom the former official might deal.

The first of these six considerations -- namely, making an agreement to govern post-employment relationships before the official departs from government -- can be brought to bear more readily on appointed officials than on Cabinet ministers. Ministers do not have much control over their future. They do not know how long they will be in office. They may be asked to resign by the Prime Minister or they may be defeated in an election.

Ministers seldom resign voluntarily to take outside employment. Their motives for resignation are likely to be mixed and may include some dissatisfaction with the policies of the

government. The Prime Minister can ask that ministers discuss with him or her their post-employment plans but this the minister may be reluctant to do when the time comes for submitting his or her resignation. Rules of procedure along this line (such as those contained in the current Guidelines applicable to ministers) are therefore of doubtful value.

As far as appointed public office holders are concerned, they can be asked to inform their minister or deputy minister that they have received an offer of outside employment and seek approval to accept it. If approval is withheld, they may still resign and accept the offered position, and nothing can be done to prevent this. In most cases, however, if they are seeking to do well with their new employer they are not likely to risk official criticism and ostracism. Those who do defy the advice of their superiors may also be people whom the government would not wish to retain in positions of senior responsibility in any event.

This brings us to the second consideration mentioned above, namely, that it is easier to enforce rules pertaining to post-employment against public office holders who are still in official positions (and who may find themselves dealing with a former official) than against those who have departed the scene. Once again, it is useful to point to the differences between the positions of former ministers and former appointed public office holders. The ability of a former minister to influence government decisions to his or her advantage depends upon which party is then in office. If his or her party is still in office, the presumption is that he or she will receive friendly attention, particularly from his or her successor in the portfolio. If the party has been defeated, he or she is not likely to receive preferred treatment and continuing officials are likely to be very circumspect in their dealings with him or her. Former appointed public office holders, in a non-politicized public service, on the other hand, can maintain their contacts and friendships regardless of the political party in power.

The question of responsibility for breaches of the rules regarding contacts between former office holders and the government is crucial. In some ways it may be quite unfair to place the primary responsibility upon the former public office holder. He or she is bound to be at a disadvantage when allegations are made about the impropriety of his or her contacts with the government. Every contact made, however innocent, becomes suspect and he or she cannot defend himself or herself when charges are made in the House of Commons. The minister can answer for himself or herself and his or her officials. If preferred treatment or any other impropriety can be shown, the former minister as well as the current holder of the portfolio will, of course, both suffer in public esteem, which is quite

proper and perhaps one of the most effective sanctions to prevent this happening in the first place.

The rules pertaining to post-employment activities should not, however, be drawn up in such a way that the onus is on the former minister to prove that he or she did not break them. We believe that former Cabinet ministers in Canada are entitled to the benefit of the doubt in terms of questions of ethical conduct. To put it any other way is an invidious basis on which to establish public policy.

Whatever rules or guidelines about post-employment apply to former ministers and appointed public office holders will be those which, while still in office, they promised to observe (as in the case of oaths of office and any instruments in writing they may have signed) or which were made binding upon them (as, we propose, the Code of Ethical Conduct would be). If such rules are changed after these office holders leave office, there is an obvious presumption that those new rules would not retroactively apply to them. This in itself is a reason to reconsider this particular aspect of post-employment rules or guidelines.

The purpose of a "cooling-off" period for former office holders who take private employment is therefore twofold: first, to minimize the conflict of interest which could arise when an office holder is offered outside employment, and, second, to minimize the advantage to the prospective employer of gaining an employee who has information and influence -- as distinct from expertise -- which gives the employer a competitive advantage in the marketplace.

The minister who has left office involuntarily should not be subject to unnecessary restrictions on his or her ability to find employment. This is manifestly unfair to the former minister and, we believe, is a factor which can discourage people from entering public life. There is something to be said for the idea that he or she should not move immediately into a business which he or she supervised or with which he or she had recent dealings while in office. This gives politics a bad name. On the other hand, this is often the business in which, because of his or her ministerial experience, the former minister is most expert. Consider, for example, the case of the person who is likely to be Minister of Industry, Trade and Commerce. Ideally, this will be an entrepreneur with considerable experience in business and industry. When that person ceases to be minister and returns to make a living as an entrepreneur, it is inconceivable that he or she could set up a new business, or likely even operate an existing one, without having in the process to deal with his or her former department, given its extensive role in grants, subsidies, export assistance, regulation and other facets of government's present-day interface with industry. Under the

current Guidelines for Ministers, such a minister would have a problem -- but he or she would have an even greater real-world problem trying to make a living in some other unrelated activity. It is not for him or her to become a university lecturer, nor is it in the country's interest to sideline its entrepreneurial talent.

A decent interval is as much in the interest of the former minister as it is in the public interest. Yet in this fast-moving world, two years is both unnecessarily long and manifestly unfair to the minister who was forced out of office. Even one year is a long time. It must be borne in mind too that if a former minister chooses to ignore any rule or guideline it may be difficult to devise an appropriate sanction, which must be considered in trying to devise a workable public policy.

Those appointed public office holders who voluntarily leave to take outside employment are in a different position from ministers, but even in those cases, the "cooling-off" period should not be excessive and if there is a serious problem which concerns the government, it would be fairer to the official and more effective from the point of view of the public interest to give the official a paid vacation before taking up his or her new employment. This approach has been used occasionally in the past. If the government believes it has an interest to protect, and wants to do that by imposing a hiatus before the official can take up new work in the private sector, then we believe the government should be prepared to pay for that. Administratively, this can be accomplished by keeping the public office holder on the government payroll but out of the office (or working on assignments completely unrelated to the pending private sector position) for the several months judged to be sufficient for cooling off prior to taking up the new position outside the government.

We note, not without some irony, that when the government recruits someone from the private sector, it hires the best person available and expects that individual to start work right away, with no "cooling-off" period, even (and especially) if he or she is coming from a part of the private sector where detailed and up-to-the-minute information is a key qualification for the position in question.

In any event, the "cooling-off" period should be required only in very carefully defined circumstances. As expressed in the fourth consideration which we listed above, there should be as few restrictions as possible on exchange of personnel between government and the private sector.

To summarize our concerns, we feel that public policy in this area of post-employment involves several ideas: in some

situations it is important to effectively prohibit "switching sides"; in other cases it is necessary to protect against use of influence derived from personal friendship or past association; in still other cases there must be some barrier against unfair use of inside information acquired while in government.

As we have already indicated, we feel fundamental distinctions must be made between ministers and appointed public office holders when devising post-employment rules. In Chapter 9 of this report, we discussed the error that we feel was made when, for reasons of logical symmetry rather than practical common-sense, the post-employment guidelines which had been developed for public servants were extended to Cabinet ministers, without recognizing the essential differences between these two groups of officials. For those reasons, we believe it would be a mistake, in the course of any major reformulation of federal conflict of interest policy and procedures, to continue that mistake into the new régime. As noted earlier, such post-employment restrictions are not imposed on Cabinet ministers in most other jurisdictions, and we see no compelling reasons from the Canadian experience why public policy at the federal level in Canada should depart significantly from this norm. We were, indeed, tempted at one stage of our deliberations to follow the example of Britain, Australia and nine of the ten provinces by recommending that any restrictions on ministers' activities after they leave office should be dropped altogether.

Nevertheless, there is something to be said for placing some restrictions on the activities of former office holders for a reasonable period of time if these restrictions can be enforced. The purpose of our recommendations is to enhance public confidence in government. It does not enhance confidence in government for former officials or ministers to be seen, immediately after leaving office, to be lobbying their successors or former colleagues, to be accepting employment or directorships with companies that had been regulated by them or had received contracts or subsidies from their departments, or to be switching sides in any matter in which they had substantial involvement on behalf of the government.

(d) Recommendations Regarding Post-Employment

In the Procedural Rules to Minimize Conflicts of Interest enacted in the form of regulations pursuant to the proposed Ethics in Government Act, in supplemental codes of departments, agencies and Crown corporations, and in the amendments to the governing Acts of quasi-judicial bodies, the provisions discussed in the following pages could be set down to deal with post-employment matters. These include: (1) acceptance of directorships, offices and employment by former public office holders; (2) making of representations by former public office

holders; (3) use of confidential information; (4) switching sides; (5) application for waiver or modification of the rules in certain cases; (6) termination of present advisory committees; (7) post-employment provisions in contracts where appropriate; (8) exemptions for scientific and technical information; (9) exemption for testifying under oath and (10) advising superiors of post-employment plans.

(i) Acceptance of Directorships and Employment By
Former Public Office Holders

We recommend that the restrictions should be as few and narrowly defined as possible.

Ministers. For ministers, we think there is a good case for following the practice in other countries with parliamentary forms of government and having no rules other than those in the proposed Code of Ethical Conduct which lays a duty on former public office holders to avoid actions that could cast doubt on the probity and impartiality of the governmental process or that in any other way could diminish the integrity of government.

If, however, the government feels that some specific procedural rule is desirable, the cooling-off period for former ministers should be, in our view, no more than six months for acceptance of directorships, office or employment with a company or organization with which, during the year immediately preceding the minister's departure from office, the department or departments for which he or she was responsible had a special relationship. (We recommend, in this context, carrying forward essentially the same definition of 'special relationship' as found in the current guidelines and changing only the reference to "corporation" to "company or organization". Thus "special relationship" means regulation of the company or organization by the department or agency, receipt by the company or organization of subsidies, loans or other capital assistance from the department or agency, and contractual relationships between the company or organization and the department or agency.) Otherwise there should be no restrictions.

Parliamentary Secretaries. For parliamentary secretaries, the same six-month rule should apply.

Ministers' Exempt Staff. For a minister's exempt staff, the same six-month rule should apply, unless the minister provides otherwise by indicating which members of his or her exempt staff are to be made subject to the post-employment rules for non-elected public office holders.

Non-Elected Public Office Holders. For non-elected public office holders, who generally have better control over their futures than ministers, we recommend they be subject to a somewhat longer cooling-off period so as to avoid the impression that they had, during their time in office, been planning to take employment with a company or organization that had had a special relationship with their department. Therefore, for deputy ministers, and other full-time Governor-in-Council appointees (other than judges, members of quasi-judicial bodies, and personnel of Crown corporations all of whom are, or are to be, subject to other rules) and for all other public office holders, we recommend that for one year there be no acceptance of an office, directorship, or employment with any company or organization with which, during the one year immediately preceding their departure from office, their department or agency had a special relationship.

These six-month and twelve-month rules could in some instances result in unnecessary and pointless restrictions on former public office holders, both elected and non-elected, seeking employment in the private sector. We therefore recommend that a former public office holder have the right to apply to the Ethics Counsellor for a reduction or a waiver of the cooling-off period where it would be manifestly unfair and where no breach of the Code of Ethical Conduct would be involved, according to a procedure we describe in section (v) that follows.

(ii) Representations by Former Office Holders

In many respects the most troublesome of the possible restrictions are any that might be imposed on dealings between former public office holders and the government. The present guidelines prohibit for a specified period the activity referred to as "lobbying", a word that is the subject of differing interpretations and should in our view be avoided in the future. Any other word to describe dealings between private interests and government, however, has its own difficulties. In the end, we chose the word "representations", which is more general and avoids the pejorative connotations that are sometimes attached to "lobbying".

We believe that the only effective means of dealing with this problem of representations made to government is to lay the responsibility on current office holders to avoid giving preferential treatment to former public office holders. Under the proposed Code of Ethical Conduct, an onus is thus placed on all incumbent public office holders to be mindful of their duty under the Code and under such procedural rules regarding post-employment as may be specifically developed, to act in all dealings with former public office holders so as never to compromise their own position or that of their department, board, agency or Crown

corporation. The fact that a former public office holder makes representations to the department of which he had been minister or deputy minister or to any other public office holder is not per se abhorrent. What matters is whether he or she receives treatment more favourable than might be accorded to anyone else in similar circumstances.

Again our disposition is to avoid suggesting rules that cannot readily be interpreted or enforced, if only because they create cynicism about the whole structure of the rules of ethical conduct. We prefer to rely on the general principles of the proposed Code of Ethical Conduct. The government of the day, however, may not be prepared to leave the matter on this basis. If the government does wish to go further and stipulate the cooling-off period for the making of representations by former office holders, ministers or other public office holders, to the department in which they had served in their last year in office, we recommend that it should not exceed one year.

Specifically, such a rule could be stated as follows: a former public office holder shall not, during the period of one year from the date on which he or she ceases to hold public office, make representations of any kind to any department (or any board, agency or Crown corporation under that department) for which he or she was responsible or by which he or she was employed during the one year immediately preceding his or her departure from public office, on behalf of himself or herself or any other person or group of persons who stand to benefit directly or indirectly from such representations, where the former public office holder receives or may receive any financial consideration or other tangible benefit, direct or indirect, in respect of making such representations.

In the case of a former minister or former parliamentary secretary who continues to hold office as a member of Parliament after departing from the office of minister or parliamentary secretary, those provisions of the Senate and the House of Commons Act which govern representations and conflicts of interest by parliamentarians would of course continue to apply, in addition to the foregoing one-year rule.

We recommend that this one-year rule be the same for all employees in the public sector -- ministers, parliamentary secretaries, ministers' exempt staff, deputy ministers, and other full-time Governor-in-Council appointees (except judges and members of quasi-judicial bodies, whom we envisage being governed by separate rules) members of the public service, and personnel of Crown corporations. Where considered appropriate, more stringent rules could be developed in supplemental codes of conduct.

(iii) Confidential Information

We recommend that the various oaths of office taken by those who assume public offices be reviewed to add or clarify wording to carry out the intent of protecting the integrity of government and preserving the confidentiality of sensitive information in the post-employment period.

(iv) Switching Sides

We recommend continuation of a rule which prevents any non-elected former public office holder when he or she enters the private sector from switching sides with respect to a specific matter in which he or she was personally involved on the government side, or which was under his or her authority as a public office holder. This prohibition against switching sides would apply not only to the former office holder who enters the private sector, but also to one who goes to work for another government. The present post-employment guidelines impose a time limit on this rule against switching sides (i.e. two years for ministers). Given that we are dealing here with specific matters, we see no reason to put any time limit on the prohibition. In short, it should be forever. A lawyer cannot switch sides at any time as an advocate on a specific case, and that is parallel to what we are dealing with here: someone in the public sector who is substantially involved in a specific proceeding, transaction, case or other matter to which the Government of Canada is a party. This substantial involvement can mean either one's personal involvement in the matter, or one's official responsibility for it, or both.

Such a rule against switching sides would not be appropriate for elected public office holders, however, since ministers and parliamentary secretaries, given their high public identification with a particular matter, could not "switch sides" after entering the private sector without risking publicity which would affect adversely their own credibility and the particular matter on which they would be acting for pay.

In rare cases, this general rule may not in fact work to the public interest. In such instances, application could be made to the Ethics Counsellor for a ruling under the procedure to waive or modify a post-employment restriction, as described in section (v) following.

(v) Application to Waive or Modify Post-Employment Rules in Particular Cases

We discussed above the difficulty in laying down hard and fast rules of general application which do not impose unnecessary and burdensome restrictions on some former public office holders. We believe that, whatever the length of the "cooling-off" period, the former public office holder should be granted the right to seek a ruling from the Ethics Counsellor that there is no reason in public policy to delay, for example, the implementation of his or her private employment plans.

There are instances where the application of the six-month or one-year post-employment rule, or the switching-sides rule, would have an inappropriate result or would not be in the public interest. In humanitarian cases, and where no breach of the Code of Ethical Conduct would be involved, we recommend that the former public office holder be able to make written application to the Ethics Counsellor, setting forth the reasons why and to what extent he or she believes the rule should be waived in the particular instance. We further recommend that in ruling on the application, the Ethics Counsellor must give written reasons for his or her decision, must state clearly the extent (if any) to which the rule is being modified or waived, render the decision promptly, and forthwith make public the decision and place a copy of same in a public registry maintained in the Office of Public Sector Ethics.

In our view, the Prime Minister, on his own initiative, would have the right to make such a written request for a waiver or modification on behalf of a former minister, former parliamentary secretary, or any other former public office holder. The results of any ruling so requested by the Prime Minister would also have to be made public by the Ethics Counsellor.

Such applications must be made in advance, and not after a post-employment rule is breached.

(vi) Termination of Present Advisory Committees

The foregoing arrangements, which contemplate a role for the Ethics Counsellor in the application of post-employment rules in specific cases, would, we recommend, replace the Advisory Committee of Ministers (which can at present exempt a former minister from the present post-employment guidelines), the Public Servants Advisory Committee, and the Governor-in-Council Appointees and Exempt Staff Advisory Committee (which each have similar powers of exemption with respect to public servants, and Governor-in-Council and exempt staff appointees, respectively).

(vii) Post-Employment Provisions in Contracts
where Appropriate

We recommend that, in those cases where any form of written contract is entered into between the Crown in Right of Canada and an individual in connection with assuming or holding a public office under the Crown, the binding effect of the Code of Ethical Conduct be expressly acknowledged, and further rules governing post-employment activities applicable to that individual be expressly agreed to.

In contrast to the present guidelines, such a contract would represent a personal commitment and could, if properly entered into so as to be legally binding in the post-employment period, be enforced.

(viii) Exemptions for Scientific and Technical
Information

We recommend that in the Procedural Rules to Minimize Conflicts of Interest and the supplemental codes an exemption to the foregoing post-employment prohibitions be made for scientific and technical information, where communication between the former public office holder and his or her former department, board, agency or Crown corporation is solely for the purpose of furnishing or obtaining scientific or technical information pursuant to established government procedures.

This exemption will allow the free exchange of such information, regardless of a former public office holder's prior participation in or responsibility for the matter. This would permit, for example, a former public office holder working on a project to make contact with the government to determine the kind and form of information required, or the adequacy of information already supplied, so long as government procedures are satisfied. In our view, the primary responsibility for developing procedures to guide activity under this exemption should be with each department, board, agency or Crown corporation, so that such procedures are appropriate to the particular characteristics of the programs and needs of each. Such procedures could be reviewed periodically by the Ethics Counsellor. These procedures would be incorporated in the supplemental code of the particular administrative unit involved.

In promulgating such procedural rules, the government department, agency, board or Crown corporation may take into consideration such matters as: limiting communications to those formats which are least conducive to the use of personal influence; segregating, to the extent possible, meetings and presentations involving matters of technical substance from those involving other aspects of the relationship; requiring that the

official in the department, board, agency or Crown corporation responsible for administration of ethical conduct rules be informed of instances where the exemption is used; or employing more restrictive practices in circumstances involving either immediate competition for contracts or applications for grants than in those involving an on-going project.

(ix) Exemption for Testifying Under Oath

We dealt above with restrictions on confidential information in the post-employment period. Nothing in these post-employment rules should be construed, however, to prevent a former public office holder from testifying before any court, board, commission or legislative body with respect to matters of fact within the personal knowledge of the former public office holder.

We therefore recommend that a provision be included in the Ethics in Government Act, to the following effect:

"Nothing in the Code of Ethical Conduct or any rules made pursuant to this Act shall prevent a former public office holder from making statements required to be made under penalty of perjury."

This provision would not, however, allow a former public office holder, otherwise prohibited from using confidential information in the post-employment period, to testify on behalf of another as an expert witness except: (1) to the extent that the former public office holder may testify from personal knowledge as to occurrences relevant to the issues in the proceeding, including those in which the former public office holder participated; or (2) in any proceeding where it is determined that another expert in the field cannot practically be obtained.

(x) Advising Superiors of Post-Employment Plans

The current guidelines state that office holders must disclose to their superiors any offers of employment that could conflict with their official duties, any offers under serious consideration from private sector organizations with which he or she has had official dealings, and any offers that have been actually accepted. We recommend that this disclosure rule continue to apply to all non-elected public office holders, and be incorporated in the Procedural Rules to Minimize Conflicts of Interest.

For the reasons given above, we see no point in retaining rules requiring ministers to consult with the Prime Minister about their post-employment plans. They are, of course, always free to do so if they wish.

CHAPTER 15

RULES TO GOVERN POLITICAL ACTIVITY

AND PUBLIC COMMENT

BY NON-ELECTED PUBLIC OFFICE HOLDERS

(a) Political Activity and Ethical Conduct

"Political activity relates to the ethical conduct of public servants", as Professor Kenneth Kernaghan wrote in 1973: "in that overt support for a political party may prevent or appear to prevent an official from carrying out his duties in an objective manner."¹

In Chapter 3, the questions of partisan political activity by a non-elected public office holder, and of criticism of government policy and administration by non-elected public office holders were considered. In Chapter 7, the history and development of federal conflict of interest laws and guidelines were reviewed, including provisions relating to partisan political activity. A synopsis of the current provisions, essentially as contained in Section 32 of the Public Service Employment Act, is set forth in Chapter 8, and full text of Section 32 is found in Schedule C of this report. We now wish to make observations and recommendations about political activity in the context of our broader proposals to deal with ethical conduct.

The freedom of public servants to participate in the political process is restricted in a number of ways, such as statutory prohibitions against being candidates for public office, working for political parties, and raising funds for candidates and political parties. The restrictions imposed on public servants today are far fewer than was formerly the case. The

1. Kenneth Kernaghan, "The Ethical Conduct of Canadian Public Servants," OPTIMUM, 4, No. 3, (1973), p. 13.

literature on this subject covers the historic evolution of these laws, and the rationale for them.²

The practical effect of Section 32 of the Public Service Employment Act has been to extend virtually full political rights to roughly 90 per cent of public servants. Under the Act, deputy ministers and heads of agencies are prohibited from engaging in political activity and certain other employees are forbidden to stand as candidates, if, in the judgement of the Public Service Commission, the employee's usefulness to the public service might be impaired by such candidacy.

Implementation of the Act's provisions on political partisanship has not won universal approval because of difficult border-line cases where the Public Service Commission has denied leave of absence to an employee wishing to stand for election. A potentially serious political problem is avoided, however, by the Act's prohibition against senior public servants and other officials in sensitive positions engaging in political activity which might involve them in real or apparent conflicts of loyalty.

It is assumed that political neutrality is good although some politicization of the public service may be unavoidable. Thus, some restrictions on political activity by public servants are appropriate. On balance, we believe the provisions contained in Section 32 strike an acceptable balance between individual freedom and the requirement for a politically neutral public service.

It is recommended, however, that Section 32 be moved from the Public Service Employment Act to the proposed Ethics in Government Act. Parallel to this change would be moving the

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2. See J. Patrick Boyer, The Legal Framework of Elections in Canada (Butterworths, Toronto, 1981), especially Chapter 16, "Freedom to Participate in the Political Process", Section (b) "Political Rights of Civil Servants"; Kenneth Kernaghan "The Political Right and Activities of Canadian Public Servants," in Public Administration in Canada, 2nd ed. (1971), pp. 382-390; Kenneth Kernaghan, "Politics, Policy and Public Servants: Political Neutrality Revisited", Canadian Public Administration, 19, No. 3 (1976), p 433; Hon. Mitchell Sharp "Neutral Superservants," Policy Options, November/December 1982; and Edgar Gallant, "The Public Servant-A Relevant Canadian", an address to the Institute of Public Affairs, Halifax, October 1983.

responsibility for administering the provisions of Section 32 from the Public Service Commission to the Office of Public Sector Ethics.

It is the present practice that when a public servant wishes to be granted leave to stand for nomination and election for a political party, the Public Service Commission renders a decision as to whether leave will be granted. It is our view that a central body is best situated to make these decisions on the recommendation (which may, of course, not always be accepted) of the deputy minister concerned. We do not feel that the decision as to granting leave should be left solely to deputy ministers in individual departments. We envisage that the "central body" making these decisions will, under the new régime, be the Ethics Counsellor in place of the Public Service Commission. As a result, there will continue to be uniform treatment of such requests across the public service.

It is the Treasury Board rather than the Public Service Commission which rules on requests for leave by a public servant to work in a political capacity (such as in the office of a minister or the office of the Leader of the Opposition) because it is at present the Treasury Board's responsibility as employer, under Sections 5 and 7 of the Financial Administration Act, to deal with such matters. We recommend that the Ethics Counsellor be given responsibility here, too, for deciding requests for such leave.

Suggesting this change should in no way be construed as a reflection upon the Public Service Commission, or upon Treasury Board, which we believe have performed these difficult and sensitive tasks with great skill. However, having political activity issues handled by the Ethics Counsellor is desirable in our view, because it centers in one place all matters relating to ethical conduct. We recognize that political activity can be viewed either as a staffing problem related to efforts to minimize partisan political considerations in appointments and promotions, or as an ethics problem. While both interpretations are legitimate, we believe that the function can be transferred from the Public Service Commission to the Office of Public Sector Ethics without removing the ability of either departments or the Public Service Commission to monitor the merit system and ensure avoidance of political patronage within the public service. On a practical level, we envisage there would be a close working relationship between the Ethics Counsellor and the Public Service Commission in this field.

In transferring Section 32 to the Ethics in Government Act, an opportunity may also be presented to remove some of the uncertainties created by the present wording of the section. Those branches of government which have had involvement or

responsibility with this subject (such as the Public Service Commission, Treasury Board, the Public Service Staff Relations Board, and deputy ministers) might make suggestions for clarification or improvements of Section 32, which could be incorporated in the wording of the Ethics in Government Act before it is introduced in Parliament. Any specific recommendations for change would of course have to be based on solid data supporting the need to revise the current wording of Section 32.

(b) Public Comment

Turning to the matter of public comment by non-elected public officials on government policy and administration, we note that there has been no change in the traditional rule that government employees are not to indulge in public criticism of government policy or administration unless they are on leave to seek election. At present, the Public Service Commission, which has the statutory authority to deal with certain types of political activity, has no similar authority to deal with public comment issues. This is an area which comes under the ambit of Treasury Board, and the matter is usually handled within the department concerned.

The area of public comment is likely to be problematic under the Charter of Rights and Freedoms, unless the restrictions in this area are concisely stated. A clear legal provision is needed restricting freedom of expression (otherwise guaranteed by the Charter to all Canadians) in the case of non-elected public office holders in a way that is both reasonable and demonstrably justifiable in a free and democratic society. We recommend for this reason that one of the principles in the Code of Ethical Conduct address the matter of public criticism by non-elected public office holders of government policy and administration. Once the Ethics in Government Act is passed, enacting the Code, such a provision would have the force of law. Wording is suggested which could doubtless be improved through consultations with public service unions and in Parliament.

We believe the role and importance of the Office of Public Sector Ethics will be strengthened by including in its mandate a role for giving advice to deputy ministers and heads of agencies, the Public Service Commission and Treasury Board.

The matters of partisan political activity and public comment by non-elected public office holders are closely related, and indeed a number of the writers on this subject treat the two as essentially the same phenomenon. At present, in the federal government, political activity and public comment are treated separately, but only for the functional reason that political activity is partly governed by Section 32 of the Public Service Employment Act and therefore handled by the Public Service

Commission, while matters of public comment and other partisan activity not covered by Section 32 are dealt with by Treasury Board, or under delegated authority from Treasury Board, by deputy ministers and heads of agencies. While it is extremely hard to distinguish between political activity and public comment in a functional way, the fact that responsibility is now divided between the Public Service Commission and Treasury Board has made it necessary to deal with them separately. The logic of bringing the two matters together under the jurisdiction of the Ethics Counsellor is yet another rationale for creating the Office of Public Sector Ethics. It should lead to a more orderly basis for dealing with public comment and political activity in the public sector.

CHAPTER 16

RULES GOVERNING JUDGES AND

QUASI-JUDICIAL BODIES

(a) Introduction

Because judges are appointed by the Governor-in-Council, as are most members of quasi-judicial bodies in the federal government, they come within our terms of reference to consider "full time Governor-in-Council appointees".

However, the importance of federally appointed judges remaining separate from the detailed application of the proposed régime, in order to preserve the independence of the judiciary, is recognized. Although the members of the quasi-judicial bodies are not judges, for our purposes it was accepted that they perform a decision-making role which is adjudicative, and it is important, in terms of public perception, for quasi-judicial bodies to be dealt with in a manner that does not treat them as another department of government.

The recent history of arrangements regarding conduct by judges is reviewed in order to clarify why no change is recommended in the arrangements. In the United States at the federal level, judges were brought into the same régime as other branches of government, in spite of their strong recommendation that this not be done in deference to the concept of judicial independence, and in spite of the existence of a judicial ethics committee handling such matters. The recommendation which we make, after careful deliberation, should not therefore be taken as given.

Recent experience with respect to Canadian judges - in terms of the arrangements which have been made to deal with matters of conduct - is reviewed because of the valuable parallels that can be seen between the role of the Canadian Judicial Council and the proposed Ethics Counsellor.

The more complex situation of the quasi-judicial bodies is examined and recommendations are made as to how our general proposal for a statutory code of ethical conduct, an Office of Public Sector Ethics, and the role of supplemental codes, can be

accommodated to quasi-judicial bodies to achieve the same results but afford them a greater measure of independence.

(b) Role of the Canadian Judicial Council

Section 39 of the Judges Act established the Canadian Judicial Council, consisting of the Chief Justice of Canada, the chief justice, and any senior associate chief justice and associate chief justice, of each superior court or branch or division of such court. Section 45 of the Tax Court of Canada Act (29-30-31-32 Eliz. II 1980-81-82-83, C. 158) amended Section 39 and established membership of the Council as consisting of the senior judge of the Supreme Court of the Yukon Territory and the Supreme Court of the Northwest Territories, the chief judge and any associate chief judges of each county court or, where there is no such chief judge or associate chief judge, such judge as is named by the judges of that court to represent the court on the Council and the chief judge advocate and judge of the Tax Court of Canada. The objectives of the Judicial Council are to promote efficiency and uniformity, and to improve the quality of judicial service, in superior and county courts and in the Tax Court of Canada.

Section 40 of the Judges Act states that the Council must, at the request of the Minister of Justice of Canada or the attorney general of a province, commence an inquiry as to whether a judge of a superior, district or county court, or of the Tax Court of Canada, should be removed from office for any of several reasons, including the following: having been guilty of misconduct; having failed in the due execution of his or her office; or having been placed, by his or her conduct or otherwise, in a position incompatible with the due execution of his or her office.

There is, therefore, an established procedure dealing with conduct by a judge which places him or her in a position incompatible with the due execution of his or her office which concern is addressed in this report.

The Canadian Judicial Council is given authority by section 40(2) to investigate any complaint or allegation made in respect of a judge of a superior, district or county court, or of the Tax Court of Canada. For the purpose of conducting an inquiry requested by the Minister of Justice of Canada or a provincial attorney general, or for conducting an investigation on its own initiative, the Canadian Judicial Council may designate one or more of its members who (together with such members, if any, of the Bar of a province, having at least 10 years standing, as may be designated by the Minister of Justice of Canada) shall constitute an inquiry committee.

Inquiry Committee For Judges

The Canadian Judicial Council, or an inquiry committee, in making an inquiry or investigation under section 40, is deemed to be a superior court, and has power to summon before it any person or witness and to require him to give evidence, including the production of documents, and has power to compel witnesses to testify. The Council may prohibit the publication of any information or documents placed before it in connection with or arising out of the investigation under section 40, when it is of the opinion that such publication would not be in the public interest. Such an inquiry may be held in public or in private, unless the Minister of Justice of Canada requires that it be held in public.

A judge in respect of whom an inquiry or investigation is being made under section 40 must be given reasonable notice of the subject matter of the inquiry or investigation, and of the time and place of any hearing. The judge must also be given an opportunity by herself, himself or counsel of being heard, cross-examining witnesses and deducing evidence on his or her own behalf.

After completing its inquiry or investigation under section 40, the Canadian Judicial Council reports its conclusions and submits the record of inquiry or investigation to the Minister of Justice of Canada. If the Council forms the opinion that the judge, in respect of whom the inquiry or investigation has been made, has become incapacitated or disabled from the due execution of his or her office by reason inter alia of misconduct or incompatible conduct, it may recommend that the judge be removed from office and that he or she cease to be paid any further salary. Any order of the Governor-in-Council to remove a judge from office, and all reports and evidence relating to the matter, must be laid before Parliament within 15 days after the order is made, or if Parliament is not then sitting, at any of the first 15 days next thereafter that Parliament is sitting, as stipulated by section 41(7) of the Judges Act.

Inquiry Into Conduct of Other Public Office Holders

It is important to note that section 42 of the Act, empowers the Canadian Judicial Council to make further inquiries. In terms of the review of present arrangements, the availability of section 42 inquiries is considered to be highly relevant and a significant alternative (for certain types of inquiry) to the proposed powers of investigation available on request of the Ethics Counsellor.

At the request of the Minister of Justice of Canada pursuant to section 40, the Council must commence an inquiry as to whether a person appointed pursuant to an act of Parliament to hold office during good behaviour (other than a judge of a superior or county court, or of the Tax Court of Canada, or a person to whom section 19 of the House of Commons Act applies, namely, any clerk, officer, messenger or other person attendant on the House of Commons, if appointed by the Crown) should be removed from office for any of the reasons set out in section 41(2). These include the person being guilty of misconduct, or having been placed, by conduct or otherwise, in a position incompatible with the due execution of his or her office. The procedures regarding inquiries under sections 40 and 41, summarized above, apply also to inquiries under section 42, with such modifications as the circumstances require.

In the case of such an inquiry into a person appointed pursuant to an enactment of Parliament holding office during good behaviour, section 42(3) further provides that the Governor-in-Council may, on the recommendation of the Minister of Justice of Canada, after receipt of the report from the Canadian Judicial Council in relation to the inquiry in connection with a person who may be removed from office by the Governor-in-Council, other than on an address of the Senate or House of Commons or on a joint address, remove the person from office by order. Any such removal order, and all reports and evidence relating to it, must be laid before Parliament within 15 days after the order is made, or when Parliament is next sitting.

Finally, with respect to these powers to inquire and investigate the procedures for removal of a judge or other person appointed pursuant to an enactment of Parliament holding office during good behaviour as provided by sections 40, 41 and 42 of the Judges Act, section 43 clarifies that other powers, rights and duties are not affected. Nothing done under sections 41 and 42 affects any power, right or duty of the House of Commons, the Senate or the Governor-in-Council in relation to the removal from office of a judge or any other person in relation to whom an inquiry may be conducted under any of those three sections.

Under the provisions of section 42 of the Judges Act, therefore, a procedure exists for investigating complaints of conduct that could relate to activities of those in quasi-judicial positions (and certain others), in as much as such public office holders are appointed by the Governor-in-Council pursuant to an enactment and hold office during good behaviour.

(c) Rules Now in Existence to Govern Conduct of Judges

Statutory Rules Governing Conflict of Interest

Section 36 of the Judges Act embodies the principle that judges are to be concerned with judicial duties, and nothing but their judicial duties. Section 36 prohibits a judge from either directly or indirectly being a director or manager of any corporation, company or firm, or in any other manner whatever, for himself or others, engaging in any occupation or business other than his or her judicial duties.

Likewise, section 37 stipulates that no judge is to act as a commissioner, arbitrator, adjudicator, referee, conciliator or mediator on any commission or inquiry or other proceeding. The carefully drawn exceptions to these rules pertain to admiralty judges, judges acting as commissioners or arbitrators or the like in matters referred by Parliament or under the authority of Parliament, or in respect of assessing compensation or damages under the Railway Act or any other public Act.

In Quebec there are also statutory provisions governing situations in which a judge must disqualify himself or herself, as contained in the Quebec Code of Civil Procedure.

A Form of "Supplemental Code"

In addition to the statutory provisions relating to the handling of matters of conduct by judges, something in the line of a "supplemental code" exists, inasmuch as two books for judges have been written at the request of the Canadian Judicial Council: a book for French-speaking judges, published in 1980, Le Livre du Magistrat, written by Gérald Fauteux, and the book for English-speaking judges, entitled A Book for Judges, written by J.O. Wilson.

These books were written as a result of the Canadian Judicial Council's view that a systematic presentation of the legal and ethical problems that confront judges, especially newly-appointed ones, in the administration of the function of the judicial office, would assist them in carrying out their duties. The books suggest solutions for such problems, some solutions being governed by statute, others being in the nature of advice. Both books address the question of conduct appropriate to members of the judiciary.

Unwritten Code Regarding Judicial Conduct

Judges are not involved in the political process or in public administration. Their initial appointment, which results in their complete removal from issues such as those which affect

ministers and public servants, is generally taken as a guarantee of their fitness for an office which carries independence from executive direction. Judges, moreover, do not determine their own agenda or what issues they will take up, or with whom. They are thus in a completely different position from ministers and from the subordinates to ministers who are in public administration. Judges do not administer any department, they are not charged with expenditure of public money or with appointments to offices, or with commercial or other relations with private bodies.

To act judicially means that judges act impartially and disinterestedly. Judges on appointment must disengage themselves from business involvements, whether those involvements be direct or indirect. If they hold shares in a company that is involved in litigation, we understand that they notify the Chief Justice and may themselves decide not to sit, or leave the Chief Justice to pass on the matter. Some judges choose to withdraw from a case, regardless of how small their financial interest. In the province of Quebec, such questions are not left simply to developed practices, as is the case in the common law provinces and the Supreme Court of Canada, but are dealt with in articles 234 and following of the Quebec Code of Civil Procedure.

The question of financial interest in pending litigation is only one minor aspect of the judges' duty of objectivity, which has ramifications that cannot be reflected adequately in detailed conflict of interest guidelines. Particular social and political views, which may be the product of years of private practice or experience have to be put aside by the judge in the discharge of his or her functions. There are other questions which judges have dealt with successfully and with discretion over the years, such as the appearance of a former partner as counsel, the involvement of a former client in litigation, or the involvement of a member of a judge's family. These matters appear generally to have been handled without any difficulty and without the necessity of the judge having to be admonished or forewarned by a written directive.

Given the statutory provisions of the Judges Act, the existence and operation of the Canadian Judicial Council, and the guidance to be found in the two books dealing with matters of conduct, it is our view that judges should not in any way be brought into any conflict of interest system of rules which the government promulgates for public servants, for others who serve in agencies of administration and for ministers of the Crown. The importance of the independence of the judiciary is underlined as is the fact that judges are required to devote themselves exclusively to their judicial duties, and the fact that the Canadian Judicial Council was created for and is empowered to deal with all allegations or even suspicions of judicial misbehaviour or impropriety.

No matter how appropriate guidelines may be for officers in the executive arm of government, it would be particularly difficult to frame a code of specific rules that would serve as a substitute for the traditions and jurisprudence to which judges now turn in cases of difficulty; and any attempt at statutory codification (beyond the general principles enunciated in the proposed Code of Ethical Conduct) would involve a grave danger of substituting new rules for the established principle of natural justice concerning "bias" and "potential bias", by reference to which new problems must continue to be determined in order to maintain standards of justice at the present level.

(d) The Position of Quasi-Judicial Bodies

When you introduced the conflict of interest guidelines in the House of Commons on December 18, 1973, Prime Minister, you addressed the position of quasi-judicial office holders:

With regard to appointments to judicial or quasi-judicial boards, agencies and tribunals, it is our hope to extend the same general guidelines. There are, however, some legal problems. I have asked that the Minister of Justice (Mr. Lang) review this matter with a view possibly to recommending amendments to existing legislation to bring it into conformity with established standards of conduct.

Although there was therefore an intention at that time to apply some kind of régime to this group, it was subsequently clarified that judges would not be included, and the provisions of the Judges Act, discussed above, would govern the situation. That left quasi-judicial boards, agencies and tribunals.

Some recent history about the difficulties encountered to date in trying to devise appropriate conflict of interest rules for quasi-judicial bodies is fundamental to understand the approach we recommend.

Who Is in the Quasi-Judicial Category?

During the decade following your comments in the Commons, Prime Minister, a number of efforts have been made to devise an appropriate approach to guidelines appropriate for quasi-judicial bodies. Not the least significant problem was that of defining "quasi-judicial" bodies for this purpose.

The distinction between "administrative" decisions and "judicial" and "quasi-judicial" decisions can be seen largely as arising out of the attempt by courts to fashion an appropriate role for themselves in reviewing the actions of administrative

authorities. Courts are conscious of the fact that all decisions cannot be made on the basis of an official evidentiary record, and that some decisions must be made on the basis of policy considerations transcending the individual concerns of people who, in one way or another, are affected by those decisions. They recognize, too, that in the case of decisions of an administrative nature, it is better for courts to exercise restraint and to defer to non-judicial processes envisaged by Parliament. The upshot of this is that many tribunals, agencies and boards in the federal government have come to be characterized as "quasi-judicial".

Two rules of thumb that have been proposed for determining whether a body is quasi-judicial or not are: (1) identify the principal or primary substantive functions which the legislation has called upon that body or office to perform; and (2) decide whether those principal or primary functions require that body or officer to determine, either by rule or by decision, private rights and obligations. On this basis, a list of approximately 36 bodies or officials in the federal government was at one stage drawn up, including, for example, the Atomic Energy Control Board, the Copyright Appeal Board, the Nuclear Damage Claims Commission, the Restrictive Trade Practices Commission, the Canadian Human Rights Commission, and the Tariff Board.

General Observations or Principles in Developing Rules of Conduct

As discussion proceeded within the government as to guidelines for quasi-judicial bodies, it appears that some five observations or principles were considered to be germane in the development of any such rules of conduct. These five points can be summarized as follows:

- (1) quasi-judicial office holders have long been and are now expected to observe a high degree of independence and impartiality in the discharge of the judicial functions of their offices;
- (2) many of the public office holders with whom we are concerned hold office "during good behaviour" under the terms of the applicable statute law, and for this reason there may be some doubt whether guidelines promulgated by the Governor-in-Council governing their conduct could be made legally effective or binding in the absence of legislation by Parliament;
- (3) the guidelines to be formulated will only apply to the judicial functions performed by the holders of the offices in question, and, in relation to other

functions, the guidelines applicable to Governor-in-Council appointees and public servants apply now;

- (4) to the extent that any rules of law relating to conflict of interest and bias, which now apply to judicial office holders, are extended to quasi-judicial office holders in relation to their judicial functions, avoidance of the strict application of those rules may be possible through disclosure by the public office holder to the parties involved in any particular matter coming before him or her, of facts that would ordinarily give rise to a conflict of interest, assuming that all parties acquiesce in his or her continuing to act in the matter; and
- (5) there is some risk that may have to be accepted in applying guidelines, even of the kind described above, to quasi-judicial offices created by statute. This risk would be that the holder of such an office may thereby be exposed to disqualification in relation to a particular matter in circumstances where the tribunal of which he or she is a member is constituted with a statutory quorum, with the result that the tribunal could find itself unable to hear or deal with the matter at all.

The proposals under consideration for quasi-judicial guidelines embody four main points: (1) the quasi-judicial official, in performing judicial functions, must abide by the same rules regarding conflict of interest as the holders of judicial office; (2) quasi-judicial officials must deal with matters that come before them in their judicial capacities with free, independent and impartial minds; (3) any business or personal relationships which would compromise or prejudice the independence of the office must be avoided; and (4) quasi-judicial officials must limit their personal holdings to ones which will not give rise to any possible bias.

By 1978, further work was being done in the government to develop appropriate guidelines for quasi-judicial bodies, although the essential provisions from the earlier versions remain the same. However, at this stage, it was felt only 14 organizations in the federal government could be identified as "quasi-judicial" and thus subject to such guidelines. These were the Anti-Dumping Tribunal, the Atomic Energy Control Board, the Canadian Radio-television and Telecommunications Commission, the Canada Labour Relations Board, the Board of Examiners under the

Canada Land Survey Act, the National Energy Board, the Canadian Transport Commission, the Public Service Staff Relations Board, the Unemployment Insurance Commission, the Energy Supplies Allocation Board, the Administrator under the Anti-Inflation Act, the Restrictive Trade Practices Commission, the Canadian Human Rights Commission, and the Tariff Board.

The revised draft guidelines of 1978 were, however, never acted upon, since there remained a concern about the principle involved in the application of guidelines to a quasi-judicial body. Essentially, this concern involved the question of the propriety, under our parliamentary system of government, of Cabinet "interfering with" or "appearing to influence" quasi-judicial bodies.

Although no official decision was taken not to pursue the issue of guidelines for quasi-judicial bodies, priorities began to change in the late 1970s and the subject remained dormant, until it resurfaced now as something we must deal with in the course of recommending approaches to deal with ethical conduct in the public sector.

This brief historical resumé indicates the profound concern which others in the past have felt about attempting to apply general procedures or guidelines to quasi-judicial bodies, and which leads us to recommend an alternative approach: the development of a specifically tailored "supplemental code" for each quasi-judicial body to be enacted as part of the governing statute of that body.

Before examining how this proposal will work, we wish to conclude this brief survey of developments during the past decade by referring, Prime Minister, to a statement you made in the House of Commons in mid-1978 in response to a question:

"...the guidelines we issued (in 1973) did not apply to judicial or quasi-judicial officers. ...Although we did look at the matter of holders of judicial or quasi-judicial offices, it was our feeling at the time we should not publish guidelines in that area, certainly not without further discussions with the courts. I think the House will understand that the government was somewhat reluctant to go from the executive or legislative branches into the judicial branch. That is why we have not published guidelines... I can tell the House that on the basis of the public guidelines, there were none for holders

of quasi-judicial offices... If the House in some way wants the government to publish guidelines in that area, we will consider the matter ... As a matter of fact, we did look into it before publishing the guidelines, but then we thought it would be more compatible with the division of powers and the non-interference by the executive into the quasi-judicial branches that we do not publish guidelines.

That there is a concern to develop some guidelines or rules for quasi-judicial bodies cannot be denied. There have been ministers, for example, who in recent years requested that the existing guidelines be applied to certain quasi-judicial entities. Thus the guidelines came to apply, for example, to full-time members of the National Parole Board, the Restrictive Trade Practices Commission, the Atomic Energy Control Board, and the Commissioner of Patents.

Other quasi-judicial bodies have taken it upon themselves to develop guidelines, and in this fashion, for example, the Guidelines on Conflict of Interest for Citizenship Judges were developed in 1979. The value of this exercise was attested to subsequently, when the minister responsible for citizenship judges learned of a conduct problem which required discipline, and was greatly relieved to learn that there had already been put in place by the Citizenship Judges, on their own initiative, a set of guidelines which could be used to deal with the matter.

Seen from the other side, it is equally true that guidelines for quasi-judicial bodies can serve to provide answers and guidance to those individuals who find themselves in potential conflict situations, and can afford them the same protection as is the case for other Governor-in-Council appointees. In short, there are instances where such rules would be welcomed, not resented, and this fact became clear to us, in the course of our hearings.

Our proposal, therefore, is the careful development of supplemental rules and procedures to assist in the avoidance of conflicts of interest, and to enable individuals to comply with the Code of Ethical Conduct. These supplemental rules and procedures must be appropriate for each quasi-judicial body in terms of its own requirements. We suggest that in developing such rules, the "Procedural Rules for Avoidance of Conflicts of Interest" (referred to in Chapter 12) could be used as a model. Its provisions which are considered appropriate for the quasi-judicial body in question can be adopted, or modified as required.

These sets of supplemental rules for all quasi-judicial bodies, would then be collected and included in an omnibus amendment clause in the Ethics in Government Act, for the purpose of amending each relevant statute (The Broadcasting Act, The Anti-Dumping Act, The Combines Investigation Act, and so forth) to add these provisions to the governing statute of each quasi-judicial body.

In the result, these rules and procedures will be laid down by Parliament as attributes of the quasi-judicial body, just as Parliament had earlier established certain other attributes of the body when bringing it into existence by the original enactment.

Because these procedural rules will have been developed in co-operation with the quasi-judicial body itself, because they are not general procedures of all inclusive application but are tailored to the quasi-judicial body's particular requirements, because they are enacted by Parliament, and because they will then constitute part of the legal framework for operation of the quasi-judicial body in question, they cannot be construed as "interference" by the government with a judicial-type body.

It will be recognized that our approach with respect to quasi-judicial bodies parallels our approach to Crown corporations, where there is also a concern about autonomy (although for vastly different reasons) and the solution we propose there is to develop specifically suited procedures and supplemental codes which can, in the case of the Crown corporations, be enacted as regulations under the governing act.

We have taken the inspiration for this approach from the fact that it has already been tried, in a limited way, in several statutes governing quasi-judicial bodies. For example, the National Energy Board Act, which establishes the National Energy Board consisting of 11 members appointed by the Governor-in-Council, stipulates in section 3 that a person

...is not eligible to be appointed or to continue as a member of the Board if he is not a Canadian citizen or if, as owner, shareholder, director, officer, partner or otherwise, he is engaged in the business of producing, selling, buying, transmitting, exporting, importing or otherwise dealing in hydrocarbons or power or if he holds any bond, debenture or other security of a corporation engaged in any such business.

Likewise, in the Anti-Dumping Act, the Canadian Radio-television and Telecommunications Act, and the National Transportation Act, there are clear conflict of interest provisions. By contrast, the Atomic Energy Control Act and the Combines Investigation Act contain nothing that is in the category of the type of provision described above for the National Energy Board.

The same might almost be said of the Tariff Board Act, although two provisions are partly related to conflict considerations. These are section 3(7), which states that no member of the Tariff Board is eligible to be a candidate for election to the House of Commons until after the expiration of two years from the date when he ceased to be a member of the Board, and section 5(10) which states that, if evidence or information that is by its nature confidential, relating to the business or affairs of any person, firm or corporation, is given or elicited in the course of any inquiry, the evidence or information must not be made public in such a manner as to be available for the use of any business competitor or rival of the person, firm or corporation, respectively.

In the case of the Anti-Dumping Tribunal, section 21(7) of the Anti-Dumping Act stipulates that each member "shall devote the whole of his time to the performance of his duties under this Act and shall not accept or hold any office or employment inconsistent with his duties and functions under this Act".

With respect to the CRTC, section 4 stipulates that a full-time member "shall devote the whole of his time to the performance of his duties under this Part", while section 5 deals with outside interests in the following terms:

- (1) A person is not eligible to be appointed or to continue as a member of the Commission if he is not a Canadian citizen ordinarily resident in Canada or if, directly or indirectly, as owner, shareholder, director, officer, partner or otherwise, he
 - (a) is engaged in a telecommunications undertaking; or
 - (b) has any pecuniary or proprietary interest in
 - (i) a telecommunications undertaking,

or
 - (ii) the manufacture or distribution of telecommunication apparatus except where such distribution is incidental to the

general merchandising of goods by
wholesale or retail.

- (2) Where any interest prohibited by subsection (1) vests in any member by will or succession for his own benefit, he or she shall, within three months thereafter, absolutely dispose of such interest.

Finally the National Transportation Act, in sections 8 and 9, deals with conflict of interest matters in these terms:

8. Whenever any commissioner is interested in any matter before the Commission, or of kin or affinity to any person interested in any such matter, the Governor-in-Council may, either upon the application of such commissioner or otherwise, appoint some disinterested person to act as commissioner pro hac vice; and the Governor-in-Council may also, in case of the illness, absence or inability to act of any commissioner, appoint a commissioner pro hac vice; but no commissioner is disqualified to act by reason of interest or of kindred or affinity to any person interested in any matter before the Commission.
9. (1) No member or officer of the Commission shall, directly or indirectly,
 - (a) have any interest in, or in any undertaking of, any railway company, air transport company, commodity pipeline company, shipping company or motor vehicle undertaking or have any interest in the obligations of any such company or undertaking;
 - (b) engage in manufacturing or selling aircraft, ships, railway rolling stock, motor trucks, trailers of buses, or pipeline equipment, or in the transport of goods or passengers by any mode of transport for hire or reward; or
 - (c) have any interest in any device, appliance, machine, patented process or article, or any part thereof that may be required or used as part of the equipment of any railway or rolling stock thereof, aircraft, ship, pipeline, motor truck, trailer or bus, or of any work or undertaking subject to this Act, the Railway Act, the Aeronautics Act or the Motor Vehicle Transport Act.

(2) Where any interest prohibited under subsection (1) vests in any member or officer of the Commission by will or succession for his own benefit, he shall, within three months thereafter, absolutely dispose of such interest.

We therefore recommend this approach. If it is accepted, it would require a specific task to be performed, consisting of, first, identifying (for purposes of excluding from the application of the "Procedural Rules to Avoid Conflicts of Interest") those bodies considered to be "quasi-judicial"; secondly, working through a check-list with each quasi-judicial body to determine which rules need to be included in that quasi-judicial body's governing statute; and, third, grouping these rules for each such body as amendments to their respective statutes, so they could then be incorporated, which we recommend, as a single omnibus clause in the Ethics in Government Act.

CHAPTER 17

RULES OF ETHICAL CONDUCT

FOR CROWN CORPORATIONS

(a) Autonomy of Crown Corporations

The status and role of Crown corporations has engaged the attention of many individuals at the federal level. Our interest is to find the appropriate point of entry for a régime of ethical conduct on the part of those who run and work in Crown corporations. We believe that, in considering the need and desirability of an applicable set of rules for ethical conduct, the degree of autonomy of Crown corporations from the government is only relevant in terms of how such rules are to be established. The approaches being followed with respect to conflict of interest seem to be those of the Crown corporations themselves.

It is our view that the public perception of Crown corporations is that they are a part of government. No matter how autonomous some Crown corporations are, the Canadian public still thinks of Air Canada, Canadian National Railways, the Canadian Broadcasting Corporation, the Northern Canada Power Commission, the Science Council of Canada, or Canada Mortgage and Housing Corporation as simply different faces of the federal government.

(b) Classification of Crown Corporations

Section 66 of the Financial Administration Act defines a Crown corporation as a "Corporation that is ultimately accountable, through a Minister, to Parliament for the conduct of its affairs, and includes the Corporations named in Schedule B, C and D (of this Act)."

In 1977, the Treasury Board Secretariat published a list of government owned and controlled corporations which included 14 "Departmental Crown Corporations" encompassing advisory and granting councils like the Medical Research Council, regulatory agencies such as the Atomic Energy Control Board, and a number of organizations which are parts of departments, such as the Director of the Veterans Land Act; 19 "Agency Corporations" including marketing agencies such as the Canadian Saltfish Corporation, a number of corporations conducting business for the government such

as Defense Construction (1951) Ltd., and some operating in a wider market like Atomic Energy of Canada Ltd.; 21 "proprietary corporations" engaged in commercial operations, such as Air Canada and Via Rail, and some financial guarantee and insurance concerns as the Export Development Corporation and the Farm Credit Corporation; 27 "other government corporations" (which seem to have few common characteristics other than the fact that they have been purchased, created or sponsored by the federal government, and ranging from the Bank of Canada to DeHavilland Aircraft of Canada Ltd.; 24 "mixed enterprise corporations" ranging from the Canada Development Corporation to the Blue Water Bridge Authority, share capital corporations owned or controlled jointly by the federal government and other governments, organizations, or individuals; a number of "subsidiary corporations and subsidiaries" (which are share corporations that are majority owned or controlled by the Crown or other government corporations); some "associated corporations" (in which the government either directly or through another corporation has a minority interest, such as Polysar Ltd. and Arctic Oil Ltd.); and, finally, 18 organizations labelled "other entities and associates" (which comprise a wide variety of quasi-public corporate bodies, many of which are non-profit organizations such as the Vanier Institute of the Family and the Forest Engineering Research Institute of Canada).

The Royal Commission on Financial Management and Accountability in 1979 indicated that the functions of Crown agencies pose two major issues, the first being the identification, classification and rationalization of the arm's length relationships of Crown agencies with government and Parliament. The report suggests criteria distinguishing Crown agencies from departments or from organizations in the private sector including nature of the tasks, ownership, source of funds, organizational forms, delegation and autonomy. However, experience has shown that classification of Crown corporations is difficult, and probably unnecessary for our purposes. Whatever sort of Crown corporation it is, the importance of ethical conduct by its personnel is manifest.

(c) Ethical Conduct in Crown Corporations

We wish to summarize some of the activity in the past several years pertaining to Crown corporations and questions of ethical conduct, and then proceed to make recommendations which will be compatible with other policy initiatives currently being developed to restructure the role and relationships of the Crown corporations with the government, regardless of what form those relationships may finally take.

In 1977, the Privy Council Office published a paper presenting the government's proposals for Crown corporations. It

challenged conventional wisdom with respect to Crown corporations that government and Parliament must avoid all but cursory intervention in their affairs lest their commercial performance be jeopardized. Without exception, Crown corporations were established by the government to achieve broad policy objectives. In the case of proprietary Crown corporations, the implementation of broad policy objectives is to be carried out as much as possible within commercial discipline, but the pursuit of commercial goals was never intended to override broad social, cultural or economic goals many of which could not be justified on purely commercial grounds. These broad goals supplement the economic objectives of the corporations.

The government proposed that directors and officers of Crown corporations be brought under the general scheme of duties and liabilities of directors as specified in the Canada Business Corporations Act in the interests of uniformity and providing directors of Crown corporations with clear standards of conduct upon which they could be judged. In the process, it was felt that a further measure of uniformity would be introduced by corporation law in Canada.

The Act specifies two types of duties for directors and officers: a fiduciary duty, and the duty of care. The first is a duty to act in good faith and applies to the exercise of power and the use of knowledge gained in an official capacity. Under the Act, a director is enjoined from using powers or privileged knowledge to personal advantage or to the advantage of someone in competition with the corporation. This standard would require directors and officers of Crown corporations to disclose in writing to the corporation any material interest they may have in a contract with the corporation. Directors would also be prohibited by law from voting on such contracts in most cases. Part-time directors and certain officers would also be required to disclose their directorships in private sector corporations and full-time directors and certain officers would be prohibited from accepting outside directorships without the express approval of the Governor-in-Council.

Other aspects of the suggested conflict of interest régime would remain informal, although the proposed "directive power" could be used to give them force. Under this scheme, full-time Governor-in-Council appointees to Crown corporations would be subjected to the same requirements as deputy ministers.

It was also proposed to ask Crown corporations to adopt guidelines for their employees similar to those for public servants, including those respecting commercial activities on leaving the employ of the government. The suggested legislation included extensive provisions on conflict of interest for directors and officers. It was proposed, for instance, that a

person holding a full-time position in a Crown corporation could not accept a directorship in a private sector corporation, would have to disclose the directorship to the appropriate minister within a specified time, and would have to resign that directorship if he or she continued to hold a full-time position. A person would not be prevented by this provision, however, from accepting or holding a directorship in a private sector corporation, if the consent of the Governor-in-Council was obtained.

The proposed legislation set out a number of details about the acceptance of full-time positions, part-time positions, and directorships with private sector companies, as well as rules for directors or officers with a material interest in any contract or proposed dealing with the Crown corporation, requiring written disclosure of the interest.

In 1979, the Royal Commission on Financial Management and Accountability (the Lambert Report) stated that up-to-date codes should be established by the boards of directors of Crown corporations, establishing policy for making payment, recording transactions, contributions, gifts, and the provision of free services, use and control of agency arrangements, including authority for payments to agents, and compliance with the laws of other countries.

The Lambert Report suggested that codes be developed in each corporation to meet its requirements and contain provisions to ensure audit and compliance. The minister responsible should receive a copy of the code, and should be able to request changes in writing if it were not in accordance with government policy. Once accepted by the Board, application of the code, including changes proposed by the minister, should become the Board's responsibility. Monitoring of compliance would be the responsibility of the Board.

"Shared enterprises" (Crown agencies in which the federal government has taken a direct equity position in common with other participants for the purpose of implementing a public policy or satisfying a public need) should follow accepted private sector management standards and practices in all areas, including "insider" classification and reporting, confidentiality, and conflict of interest requirements. The government has an obligation, the Lambert Commission asserted, to ensure adherence to its standards of commercial and ethical practice by shared enterprises through representation on the Board.

Any government policy concerning freedom of commercial Crown corporations to operate like other business enterprises, should not affect the development of coherent policy to govern ethical conduct. The public interest component in the

role of Crown corporations (whereby the Crown corporations are accountable for and serve as instruments of public policy) argues for codes of conduct for employees of Crown corporations. The closer commercial crown corporations are to private sector businesses, the more persuasive is the argument for implementing a code of conduct since, in their sector companies, the Crown corporations would wish to adopt codes of ethics and rules for conflict of interest as a large number of Canadian private corporations have done in recent years.

(d) Present Codes of Ethics of Crown Corporations

In addition to those senior officials in Crown corporations who are subject to the current conflict of interest guidelines as Governor-in-Council appointees, a number of Crown corporations have developed codes of ethics or rules about conflict of interest. In some cases these amount to a thorough-going code, in others to a few general provisions. The following is sampling of the present state of development on the ethics front:

The Canada Mortgage and Housing Corporation (CMHC) utilizes several different sets of guidelines. For members of the Board of Directors who are not officers of the corporation and who are not members of the public service, a set of guidelines have been compiled which include the provisions of the CMHC Act, provisions in Part IV of the Canada Business Corporations Act and those in Bill C-27 (an Act respecting Crown Corporations, given first reading in 1979, regarding conflict of interest and directors holding part-time positions).

The guidelines provide that a director cannot be a director, officer or employee of a lending institution, nor can he or she be employed in a provincial government or the Public Service of Canada, nor in any office or position for which salary is payable out of public money. Directors also may not have interests, direct or indirect, as shareholders in a lending institution and offers of appointment as a director of another corporation must be disclosed to the corporate secretary of CMHC, as must directorships held on the day of appointment as a director of CMHC.

There are rules of disclosure concerning other directorships or offices, or of interest in a material contract, and the Post-Employment Guidelines also apply. Other CMHC employees are subject to the 1973 Public Servants Guidelines and the supplemental Standards of Conduct contained in the CMHC Guidelines and Procedures Manual. These standards of conduct were developed to ensure, among other things, that no conflict exists or appears to exist between the private interests of an employee and his or her official duties. Funding provisions under the

National Housing Act may not be used by employees for investment purposes. Employees may not take part in public discussions, orally or in writing, of the affairs, policies or organization of the corporation. Employees are entitled to undertake secondary employment. The proscriptions against political activity are the same as those contained in the Public Service Employment Act, except that CMHC management reserves the right to grant leave to run for nomination or election. Transgressions would constitute misconduct, which could warrant dismissal.

The National Arts Centre has corporate by-laws which are specific in their direction:

No employee shall be in conflict of interest with the Corporation and, in particular:

- a) have a direct or indirect interest in any contract with the Corporation, or any goods or services supplied to or work done by or for the Corporation (other than under his or her own contract for personal services) unless, because of the special nature of goods, services or work available from or through an employee, an advantage to the Corporation is not otherwise obtainable, the Director General shall authorize in writing the acquisition of such goods, services or work, with the approval of the Chairman or Vice-Chairman;
- b) engage in employment or work for remuneration or profit, other than that included in this contract with the Corporation, unless expressly authorized to do so by the Director General, with the approval of the Chairman or Vice-Chairman.

The policy statement used by Air Canada is standard in asking employees to arrange their private affairs so as to avoid actual and apparent conflicts involving compromising situations and pecuniary and other interests. The code contains a list of potential conflict areas which are subject to disclosure, review and advice, including:

serving as a director, officer, employee, member or consultant of a subsidiary or associated company, a supplier, large customer or competing company, or any other company, partnership, association or commercial entity that has a significant present or prospective business relationship with Air Canada if such service could either place on employees demands

inconsistent with their duties, call into question their capacity to perform those duties in an objective manner, or cause job performance to suffer.

There is another listing of actual or apparent conflicts of interest which are to be avoided. These involve the improper use of information, and use of company materials and time for personal gain. Areas of conflict, actual or potential, are reviewed by the Air Canada Audit Committee. Employees are required to sign declarations of compliance "on hiring and subsequently from time to time".

The Canadian Wheat Board's regime on this subject consists of a set of guidelines which contain the standard clauses regarding financial interests, statements concerning privileged information and its disclosure during the period of employment, and a caution to employees about using confidential information after they leave the Board.

The Code of the Freshwater Fish Marketing Corporation is simple. Based on "fairness and impartiality", it prohibits gifts and favours of value in business relationships as well as monetary interests (employee and immediate family) in business related to the Corporation. Also banned is beneficial interest in commercial fishing operations in the area served by the Corporation.

A number of Crown corporations have chosen simply to adopt the 1973 Public Servants Guidelines as they stand. Examples of such Crown corporations are the Livestock Feed Board of Canada, and the Pacific Pilotage Authority of Canada.

Other Crown corporations, such as The St. Lawrence Seaway Authority and The Canadian Saltfish Corporation, have not drawn up guidelines on this subject for their employees.

(e) An Approach to Ethical Conduct for Crown Corporations

We wish to make a series of recommendations with respect to Crown corporations which are consistent with the general program proposed for the rest of the public service and compatible with the types of recommendations we anticipate will be made by others concerning the future role of Crown corporations in Canada.

There are two categories of people working in Crown corporations, those who are appointed by the government, and those who are hired by the Crown corporation. Each are subject to rules, the former by guidelines developed by the government, the latter by whatever code of conduct or similar rules that have been developed by the Crown corporation.

While many employees of Crown corporations may disagree with the public perception that they are part of the federal government, it is accepted generally that they are in some way part of the public sector. It is precisely for this reason that many of our earlier recommendations, and the terminology found in the Code of Ethical Conduct and elsewhere, uses the broader expression "public sector". Our clear intention is to devise a program which can be applied throughout all branches of the federal government's operations, including those which consider themselves to be autonomous. There is nothing in the Code of Ethical Conduct which should pose any problem to anyone working in a Crown corporation.

Second, with respect to Crown corporations which are active as business enterprises in the marketplace, the conflict of interest provisions in the Canada Business Corporations Act should be made applicable to them, in particular, section 115 which deals with disclosure by a director or officer of any interest in a material contract with the corporation, or of a material interest in any proposed contract with the corporation. The fiduciary duties of directors and officers of corporations, as set forth in section 117 of the Canada Business Corporations Act, should apply. In exercising their powers and discharging their duties, they face a legal duty to "act honestly and in good faith with a view to the best interests of the Corporation" and to "exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances".

Third, each Crown corporation should be required to develop its own supplemental code of ethical conduct for approval by the minister responsible and made public. We recommend the same procedure for Crown corporations that we recommend elsewhere for departments and agencies of government. Those which do not yet have supplemental codes should develop them, and those which have already developed some rules may wish to reformulate them with the assistance of the Office of Public Sector Ethics.

Responsibility for developing the supplemental code should, in our view, rest with the board of directors of each Crown corporation which has such a board. It will be the directors' responsibility to settle conflict of interest policy. For those boards of directors wishing assistance on this from the Office of Public Sector Ethics, we recommend preparation of a checklist of points to be dealt with, and drafting of a model supplemental code by the Office of Public Sector Ethics so that common definitions, terms and procedures will be in use throughout the entire public sector. We expect that, based on a number of the submissions made to us by heads of Crown corporations, any assistance from the Office of Public Sector Ethics in developing such a supplemental code would be most welcome. A supplemental code would deal with specific needs or requirements of a

particular Crown corporation, and would fill in the specific concerns that are not addressed in the over-arching principles from the Code of Ethical Conduct.

The supplemental code, as adapted by a particular Crown corporation, would be submitted for approval by the responsible minister and made public. These supplemental rules would apply to all in the Crown Corporation, from the top to the bottom. By leaving the decision up to the board of directors of each Crown corporation as to how extensively it wishes to deal with matters in its supplemental code, it is not necessary for us to differentiate between the types of Crown corporations as to their function in the market place. To implement this recommendation, we suggest a simple provision being added to the Ethics in Government Act, to require Crown corporations to develop by-laws along the lines of a model supplemental code prepared by the Office of Public Sector Ethics, but to leave primary responsibility for this task in their hands.

Fourth, the chairperson of a Crown corporation should be empowered to refer a matter to the Ethics Counsellor for advice or investigation, as the chairperson sees fit, similar to the way in which a deputy minister might deal with such a matter of ethical conduct arising in his or her department.

Fifth, upon their appointment to the board of directors of a Crown corporation, individuals should be required to disclose, on a confidential basis, their financial holdings and activities to the Ethics Counsellor. In this way, the Ethics Counsellor will be able to advise whether there is any likelihood of a conflict of interest problem which the director might wish to take into account in discharging his or her responsibilities, and to resolve by using the procedures available for this purpose. In our view, this disclosure requirement should apply equally to full-time and part-time directors.

Sixth, contracts of employment with Crown corporations should contain specific provisions relating to prohibited activity after leaving the employ of the corporation, along the same lines as those set out in Chapter 14 of this report which deals with post-employment policy for ministers and public servants. We do not favour an overly restrictive approach in this area. At the same time we recognize a public interest in protecting against the abuses which can arise in the post-employment situation.

Since many of those appointed by the Governor-in-Council as officers and directors of Crown corporations are part-time appointees only, the supplemental codes ought to take this into account, where necessary, to establish special rules. Very little may be needed in the way of additional rules, since the basic

conflict of interest and fiduciary duty provisions of the Canada Business Corporations Act would (if our recommendation on that point is carried through) apply and would govern the actions of directors and officers, whether full-time or part-time.

We believe that the foregoing recommendations comprise a mutually consistent approach for all Crown corporations. Our approach, we believe, allows the necessary degree of differentiation among various categories of Crown corporations in a way that achieves the merits of a written code of conduct, with common terminology and procedures throughout the public sector, but tailor-made to the needs of individual Crown corporations.

CHAPTER 18

IMPLEMENTING THE NEW REGIME

(a) Methods of Implementation

We have recommended substantive provisions to deal with conflict of interest matters and a number of additional proposals incidental or secondary to the substantive provisions.

Many of our recommendations can be implemented by Order-in-Council without further statutory authority. Yet some clearly require enactment by Parliament. One such exception relates to quasi-judicial bodies, whose statutes should be examined and amendments put before Parliament to ensure that there are adequate rules within each of the statutes to minimize conflicts of interest of their members and employees. Another exception relates to the recommendation that all Crown corporations be governed by Conflict of Interest provisions in the Canada Business Corporations Act and that the Board of Directors of each Crown corporation develop a written supplemental code appropriate to its own needs and adopt it by a by-law subject to approval by the Governor-in-Council. Still another is the proposal with respect to section 32 of the Public Service Employment Act.

We recommend that the new régime we propose, the principal features of which are:

- adoption of a Code of Ethical Conduct, applicable throughout the entire federal public sector, and
- formation of an Office of Public Sector Ethics to continue the present conflict of interest role of the Assistant Deputy Registrar General and be vested with additional powers,

be approved by Parliament, either by resolution or preferably by statute. The other provisions could be incorporated in the statute.

A debate on the subject would serve as the forum within which the many considerations and concerns dwelt upon in this report could be aired. Further, endorsement by Parliament of the

Code of Ethical Conduct for those in the public sector would give it greater authority, and invest it with symbolic value. Similarly, the creation of the Office of Public Sector Ethics by an Act or resolution of Parliament, rather than by Order-in-Council, would enhance the authority of that Office and the Ethics Counsellor.

It would not be wise, however, to put into an Act of Parliament the details of the procedures that have to be followed by public office holders to minimize conflict of interest. These procedures will undoubtedly be modified from time to time as circumstances change, and the necessity of going to Parliament for amendments to the statute would result in inevitable and undesirable delays in putting necessary changes into effect. It is sufficient, in our view, that the procedures be promulgated as Regulations pursuant to the statute, and that, as provided in the draft statute, the Ethics Counsellor report on the extent of compliance.

(b) Outline of Possible Ethics in Government Act

For discussion purposes, we have prepared an outline of a possible bill which could be introduced in Parliament if this is the vehicle chosen to implement the recommendations. The Act would require public office holders to act in accordance with certain principles of conduct. It would provide for the creation of the Office of Public Sector Ethics and the appointment of an Ethics Counsellor as head of that Office whose functions would be to assist in the administration of procedures designed to minimize conflicts of interest of those in the public sector. It would also provide for amending the statutes of certain quasi-judicial agencies for the purpose of minimizing conflicts of interest of members of those agencies.

The draft Bill appears as Schedule E to this report.

(c) Need for Discussion and Understanding Prior to Implementing Program

Implementation by an Act of Parliament will generate far greater public discussion than the mere promulgation of an Order-in-Council, and open and full debate of the questions raised in attempting to deal with ethics in Government is vital. This is seen as an important part of the consciousness-raising exercise that must be part of any movement to legislate on this subject.

In your letter to us, Prime Minister, you asked us to consider the experience of private industry. In doing so, we spoke with a number of senior officials in companies which have in recent years developed conflict of interest or code of ethics rules and one clear message emerged. It is not valuable, indeed

it can be counter-productive, simply to announce that new policies are in place, and post them on the bulletin boards on company premises. A deliberate effort to evolve the rules gradually is required. Those who will be affected should be involved in discussions about the rules and be able to make suggestions that are taken into account.

In addition to this participatory approach, a second clear lesson from industry is to involve the most senior executives and managers. Companies which have had the greatest degree of acceptance and success with conflict of interest policies are those where the Chief Executive Officer, rather than just the Director of Personnel, took an active interest in the subject and signaled to one and all that this was a matter of true importance. Translated into public sector terms, these lessons suggest some obvious courses of action.

(d) A Further Method of Implementation: Contract Law

We believe it is important to give the Code of Ethical Conduct the force of law, which can be done in at least two ways. One is to make the Code binding as statute law through its enactment as part of an Act of Parliament, the course we recommend. A second way to give the Code of Ethical Conduct additional legally binding force is to have it incorporated as a term or condition in employment contracts with the Government of Canada. If the approach of contract law is adopted, it will be manifested in different ways depending on the position of the individual concerned. In some cases, for those who are subject to a collective agreement, the Code of Ethical Conduct could be incorporated in the collective agreement. In cases of public office holders not signatories to any employment contract but who are simply appointed to office at pleasure or for a specified term, the approach might be different.

Where the ethical rules are made an express part of a public office holder's contract this would include not only the Code of Ethical Conduct (which presumably would already be binding under the wording of the statute which enacts it), but also the supplemental departmental or agency code. In all cases where practical, we recommend that the Code of Ethical Conduct be incorporated in any employment contract or similar document governing the terms and conditions of employment or holding office under the Crown in Right of Canada. In cases where such contracts are, in effect, nothing more than an exchange of letters, the signed acceptance of which forms the agreement between the individual and the federal government, we recommend that the Code of Ethical Conduct be set forth in such letters as being one of the terms and conditions governing the holding of such a position. The practices of various departments in sending out letters of offers have been reviewed. Some departments do not

refer to the conflict of interest guidelines; some refer to them and give a scanty statement of what they deal with and suggest where the guidelines can be obtained; still others send a copy of the guidelines and related material.

In all cases, whether there exists an employment contract or not, we recommend that each public office holder be required, once each year, as part of a scheduled program, to sign a copy of the Code of Ethical Conduct. This practice is followed in a number of private companies for all staff from the most junior person to the Chief Executive Officer. While we do not favour creation of a papermill, this procedure can be appropriate in certain instances.

Variations of this approach are already followed in some government departments and offices. For example, the Department of Finance has a form on which an employee certifies as follows: "I acknowledge that I have this day received a memorandum on the subject of 'Conflict of Interest' from the Deputy Minister of Finance, Canada, dated March 19, 1982 which memorandum includes an extract of the Order-in-Council entitled "Public Servants Conflict of Interest Guidelines" being PC 1973-4065 and dated December 18, 1973." At the Office of the Auditor General, employees are required to sign a statement, on commencing employment with the Office, that neither they nor their immediate family has any interest that could jeopardize or call into question their judgement or objectivity. This disclaimer also requires that the employee inform the appropriate authorities in the National Capital Office of any potential conflict of interest that might arise at a later date.

CHAPTER 19

CONCLUSION AND

SUMMARY OF RECOMMENDATIONS

(a) Concluding Comments

Our enquiries have led us to the conclusion that the time was ripe for a comprehensive inquiry into the rules now governing ethical conduct in the federal public sector, particularly in relation to conflicts of interest. Not that there is any serious question about the integrity of public office holders. By any measure the standards of their ethical conduct are high for which as Canadians we should be grateful. However, the rules, which have evolved gradually over the years to deal with problems as they arose, need to be reformulated to ensure consistency in content and administration and to make them as simple, fair and reasonable as possible.

Our Terms of Reference asked us to have "particular regard to the need to ensure both public confidence in the integrity of the governmental process and the need to attract to government individuals of high calibre from all walks of life." We have endeavored to achieve this balance in our recommendations. Canadians of high calibre, in our view, are not going to be deterred from taking public office by requirements to conduct themselves in office in an ethical fashion or by reasonable rules which require them to avoid activities and to divest themselves of holdings that would involve conflicts between their public duties and their private interests. Indeed, such individuals will be encouraged to enter public life by the knowledge that the prevailing standards of conduct are high.

It is, however, unfair to public office holders and it does not encourage recruitment of Canadians of high calibre if the rules - as some of them now do - impose unnecessary sacrifices on public office holders and their families. Our recommendations therefore are directed at establishing rules that are clear and workable, but no more than are necessary.

In this report, we have reviewed practices in relation to ethical conduct and conflicts of interest in other jurisdictions with parliamentary forms of government like our own - the Canadian provinces, the United Kingdom, Australia and New Zealand. As might be expected, there are very great differences among them but the approaches are similar to those followed by the federal

government. Several of the provinces describe their rules as "guidelines". As a generalization, it is fair to say that the existing federal guidelines are as comprehensive in dealing with ethical conduct and conflicts of interest as those of any of the provinces of Canada, more comprehensive than most of them, and noticeably more comprehensive than the rules that exist in the United Kingdom, Australia and New Zealand. It is noteworthy that in only one of the parliamentary jurisdictions that we examined are there any written restrictions on the activities of ministers when they leave office, and that is in the Province of Newfoundland.

Hence, our recommendations are in no way inspired by a need to "catch up" with the provinces or with other countries.

Practices in the United States were also examined. Although that country has a different form of government and a more legalistic approach, which we do not think appropriate in Canada, we have been impressed by some of the things that are done at both the federal and state levels to ensure that the rules relating to ethical conduct and conflicts of interest are known throughout their respective public services, as well as by the emphasis on disclosure and the so-called "Sunshine-in-Government" approach.

We also asked for and obtained a good deal of up-to-date information about how matters of conduct and conflicts of interest are handled by the professions and business organizations. The evidence which this material provides of the growing sensitivity of those in the professions and business as to public perceptions of their ethical standards is impressive. While the professions of medicine, engineering and law long ago formulated principles of professional conduct, these principles are being re-examined to see if they meet rising public standards and expectations. In business, the same tendency is apparent. More and more companies, particularly the larger ones, are formulating and applying codes of conduct for their officers and employees. Our examination of business practices in large private corporations reinforced our view about the desirability of distinctive codes of conduct for each federal Crown corporation, in addition to any code of conduct applying to public office holders throughout the public sector.

In the course of our work we received hundreds of letters and interviewed many people. All of those interviewed were critical of some aspect of the current guidelines. Those letters that related to the guidelines were similarly critical. Yet no one disputed the necessity for some form of written rules and few, if any, criticized the basic principles on which the current guidelines are based. Although both of us who are members of the Task Force, entered Cabinet, one in 1957 and one in 1963,

before there were any written guidelines of this kind, we share the view that written rules have become necessary and that the principles underlying the current guidelines are sound.

However, there are serious defects in content and administration in the current guidelines and other related rules dealing with conduct and conflicts of interest in the federal public sector. Chief among these defects are the following.

- The current guidelines are a mixture of principles of conduct and procedures to minimize conflicts of interest, some of which are hortatory and some of which are mandatory, leading to uncertainty as to whether they have to be observed.
- The current guidelines do not take into account sufficiently the varying duties and responsibilities of those appointed to public office by the Governor-in-Council.
- At levels below deputy minister, there is a lack of consistency in the content and administration of the rules.
- The current guidelines do not have the flexibility necessary to avoid inadvertent and unnecessary hardship to individuals in all instances.
- Quite properly, the current guidelines do not apply to quasi-judicial agencies of government, but there are either no rules or inadequate rules to govern the conduct of members of some of these agencies.
- The rules of conduct and the procedures for minimizing conflict of interest applying to Crown corporations and their officers need clarification.
- The guidelines applying to the activities of public office holders when they leave office and enter private life -- the so-called post-employment guidelines -- do not sufficiently recognize the differences between ministers and senior public servants in the circumstances surrounding their departure from office, and are ambiguous or, in some respects, unnecessarily restrictive.

While our recommendations are directed to remedying these defects, they have a broader purpose as well, which is to enhance public confidence in the integrity of the governmental process at the federal level. We believe the time has come to

codify and make better known the rules of ethical conduct that prevail in the public sector and to enhance their authority by parliamentary approval.

We also believe that the establishment in government of an Office of Public Sector Ethics concerned solely with the administration of the procedures for minimizing conflicts of interest and headed by a person of recognized status and integrity would help to enhance public confidence.

(b) Summary of Principal Recommendations

This report contains many recommendations relating to conduct and conflicts of interest in the public sector. The principal recommendations, i.e. those that illustrate our general approach, can be summarized as follows. To facilitate reference, the relevant chapters of the report are indicated in parentheses.

A. Simplicity, Fairness, Reasonableness

Rules and procedures dealing with ethical conduct to be based on the three concepts of simplicity, fairness and reasonableness. (Chapter 2)

B. Individual Responsibility

The principle of individual responsibility for one's conduct to be maintained in any system of rules respecting ethical conduct in the public service. (Chapter 4)

C. Reformulation of the Rules

The word "guidelines" be abandoned as ambiguous. The content of the current guidelines be replaced by:

- (i) a short, simple Code of Ethical Conduct, binding upon all public office holders;
- (ii) Procedural Rules to Minimize Conflicts of Interest, such as those requiring public office holders to divest themselves of securities and other holdings, to be applied in relation to their rank and classification and, where practicable, in relation as well to their duties and responsibilities. The most comprehensive of these procedural rules to be applied, as now, to ministers and deputy ministers.
- (iii) Supplemental Codes of procedures and rules, to meet particular conflict of interest problems encountered by individual departments, Crown corporations, and agencies of government. Existing

supplemental codes to be restated, employing common terminology and uniform procedures. (Chapter 12)

D. Office of Public Sector Ethics

Formation of an Office of Public Sector Ethics, headed by a highly respected senior person to be known as the Ethics Counsellor.

This Office to absorb the functions currently performed by the Assistant Deputy Registrar General (ADRG) and to have additional powers to advise, educate, administer, investigate and exercise authority in prescribed cases to modify or waive procedural rules where no violation of the Code of Ethical Conduct is involved.

The new Office to have, in comparison with the ADRG, a clearer mandate, broader powers, and a higher public profile. (Chapter 13)

E. Judges and Quasi-Judicial Bodies

To preserve the independence of the judiciary, federally appointed judges, although to be governed by the Code of Ethical Conduct, to remain separate from application of the Procedural Rules to Minimize Conflicts of Interest, and instead to continue to be governed by the Judges Act in this regard.

Similarly, for quasi-judicial bodies to maintain sufficient independence, a specifically tailored "supplemental code" for each to be enacted as part of its governing statute. Such supplemental rules and procedures to be appropriate for each quasi-judicial body in terms of its own mandate, developed in cooperation with the quasi-judicial body itself. (Chapter 16)

F. Crown Corporations

Crown corporation personnel, as part of the federal public sector, to be subject to the Code of Ethical Conduct, Governor-in-Council appointees to Crown corporations to be subject to the Procedural Rules to Minimize Conflicts of Interest, and employees hired by the corporation to be subject to whatever supplemental code of conduct is developed by the Crown corporation. Each Crown corporation to develop its own supplemental code of ethical conduct for approval by the Minister responsible. Responsibility for developing a supplemental code to rest with the board of directors, with a provision in the Ethics in Government Act requiring each Crown corporation to do so in accordance with a model code prepared by the Office of Public Sector Ethics.

The chairperson of a Crown corporation to be empowered to refer a matter to the Ethics Counsellor for advice or investigation, as he or she sees fit.

Upon appointment to a board of directors of a Crown corporation, individuals to be required to disclose, on a confidential basis, their financial holdings to the Ethics Counsellor.

Contracts of employment to specify prohibited activities in a post-employment situation.

Officers and directors of Crown corporations active in the market place to be subject to the conflict of interest provisions of the Canada Business Corporations Act. (Chapter 17)

G. Divestment of Holdings

The following changes to be made in the present procedures for minimization of conflicts of interest:

- (i) restoration of frozen trusts as an alternative form of divestment of securities for ministers, subject to specified limitations and approval by the proposed Office of the Public Sector Ethics;
- (ii) introduction of a de minimis rule to avoid unnecessary trouble and expense for those who have small holdings or investments;
- (iii) enlargement of the scope of public and private disclosure as an alternative to divestment by placing one's assets in trust or by selling them.

(Chapter 6)

H. Ambassadors and Heads of Post

Foreign service officers who are Governor-in-Council appointees, such as ambassadors and heads of post, to be treated as regular public servants under the jurisdiction of Department of External Affairs and subject to the supplemental rules of that department. (These public servants are currently being subject to full divestment rules, as Governor-in-Council appointees.) (Chapter 9)

I. Spouses

Clarification of the current guidelines relating to spousal and other family member's assets and activities to be incorporated in the Procedural Rules to Minimize Conflicts of Interest and in the supplemental codes of conduct for departments,

agencies and Crown corporations. Transfers of assets to a spouse or family member not to be made to avoid the operation of the procedural rules. (Chapter 11)

J. Post Employment Activities

The code of ethical conduct to include the following:

Public office holders have a duty not to act, after they leave office, in such a manner as to cast doubt on the probity and impartiality of the governmental process or in any other way to diminish public confidence in the integrity of government.

Any restrictions to implement this provision of the Code to be as few and as specific as possible so as to facilitate movement between the public and private sectors and to recognize the differences between ministers and non-elected office holders in the circumstances surrounding their departure from office.

Having in mind these principles,

The Procedural Rules to Minimize Conflicts of Interest to stipulate time limits (a "cooling-off" period) for such post-employment matters as: (1) acceptance of directorships; (2) making of representations by former public office holders; (3) use of confidential information; and (4) switching sides with respect to issues with which one was identified while in public office.

For dealings between former office holders and the government, the onus to be placed squarely upon current office holders to avoid preferential treatment in their dealing with former office holders.

Former public office holders to have the right to present the facts of their proposed private employment to the Ethics Counsellor and seek a waiver or modification of the "cooling-off" period on the grounds that what they propose to do does not reflect adversely on the integrity of government. Such requests, and rulings, to be in writing and made public. (Chapter 14)

K. Political Activities of Public Servants

Restrictions on political activities of public servants and public comment by them to remain in principle as they are now, but to be included in the proposed Code of Ethical Conduct, and administrative responsibility transferred from the Treasury Board and the Public Service Commission to the Office of Public Sector Ethics.

Section 32 of the Public Service Employment Act be transferred to the proposed Ethics in Government Act, so the Office of Public Sector Ethics will be responsible for dealing with requests of non-elected public office holders for leave to work in a political capacity. (Chapter 15)

L. Parliamentary Action

Enactment by Parliament of an Ethics in Government Act, to make binding on the entire federal public sector the Code of Ethical Conduct, to establish the Office of Public Sector Ethics, to grant authority to promulgate, in the form of regulations, Procedural Rules to Minimize Conflict of Interest, and to deal with related matters such as ethical conduct procedures for Crown corporations and for quasi-judicial agencies. (Chapter 18)

M. Employment Contracts

To give the Code of Ethical Conduct the further force of law, incorporate it as a term of one's employment contract with the Government of Canada, where appropriate. (Chapter 18)

SCHEDULE A

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We wish to thank those who took the time to appear at hearings and make submissions with respect to conflict of interest matters including a number of representatives of the private sector, and individual citizens. Those interviewed who have a present or past association with the public sector include Hon. Lincoln Alexander, former Minister of Labour; James P. Bruce, Assistant Deputy Minister, Atmospheric Environment Service, Environment Canada; Robert B. Bryce, former Clerk of the Privy Council; Hon. J. Judd Buchanan, former Minister of State for Science and Technology; Hon. Iona Campagnolo, former Minister of State for Fitness and Amateur Sport; Edmund Clark, Associate Secretary of Treasury Board; Sylvain Cloutier, President, Export

Development Corporation; James C. Corkery, Master-President, Royal Canadian Mint; Hon. Barnett J. Danson, former Minister of National Defence; Hon. Robert R. de Cotret, former Minister of State for Economic Development; Paul W. Dick, Member of Parliament; Geoffrey C. Edge, Chairman, National Energy Board; David C. Elder, Director, Executive Pool/Secondments Coordination Division, Department of External Affairs; Keith Evans, Department of Justice; R. Gordon L. Fairweather, Chief Commissioner, Canadian Human Rights Commission; Hon. Alastair W. Gillespie, former Minister of Energy, Mines and Resources; Dr. James Gillies, Dean of the Faculty of Administrative Studies, York University, and former Member of Parliament; Hon. Heward Grafftey, former Minister of Science and Technology; James F. Grandy, former Deputy Minister, Department of Industry, Trade and Commerce; James G. Harris, Assistant Deputy Minister, Personnel Branch, Department of External Affairs; Ivan L. Head, President, International Development Research Centre; Hon. Céline Hervieux-Payette, Minister of State for Youth; Paul Labbé, President, Canadian Industrial Renewal Board; Dr. J. Maurice LeClair, President of Canadian National; Hon. Edward C. Lumley, Minister of Industry, Trade and Commerce; Marcel Massé, Under-Secretary of State for External Affairs; R.K. McLeod, Public Servant, Transport Canada; Dr. John Meisel, former Chairman, Canadian Radio-Television and Telecommunications Commission; C.R. Nixon, former Deputy Minister of National Defence; Senator Michael Pitfield, former Clerk of the Privy Council; Hon. John M. Reid, Member of Parliament; Simon S. Reisman, former Deputy Minister of Finance; Judge Margaret Rideout, National Coordinator for Citizenship Judges; Donald K. Smith, Director General, Atmospheric Environment Service, Environment Canada; William Teron, former Chairman, Canada Mortgage and Housing Corporation; Max Vermij, Transport Canada; Mr. Ramsey Withers, Deputy Minister, Transport Canada; and John R. Woods, Executive Director, Standards Council of Canada.

In our review of the private sector, we dealt with representatives of several of the professions, and met in person with: Robert McKercher, President, Claude Thompson, Vice-President, and Robert Wells, Treasurer, of the Canadian Bar Association.

As well, we gathered, in a single place, all codes of conduct currently in use throughout the federal public service, including the codes (where they exist) for the Crown corporations. These were analyzed in relation to supplementary information obtained from government officials about the working of conflict of interest rules for which they have particular responsibility. These individuals are: Liliana I Birtz, General

Counsel and Corporate Secretary, Canada Mortgage and Housing Corporation; Dr. Pierre Bois, President, Medical Research Council of Canada; J.P. Connell, Deputy Minister, Agriculture Canada; D.B. Dewar, Deputy Minister, Department of National Defence; Léo A. Dorais, Vice-Chairman and Secretary-General, National Museums of Canada; T.D. Finn, Executive Director, Security and Intelligence Transitional Group, Solicitor General Canada; Fred E. Gibson, Deputy Solicitor General, Solicitor General Canada; R.J. Giroux, Deputy Minister, Revenue Canada (Customs and Excise); R.M. Hammond, Superintendent, Department of Insurance Canada; J.H. Jennekens, President, Atomic Energy Control Board; W.A. Kennett, Inspector General of Banks, Department of Finance Canada; Larkin Kerwin, President, National Research Council of Canada; Maurice Lafontaine, Deputy Minister, Indian and Northern Affairs Canada; Gaétan Lussier, Deputy Minister and Chairman, Employment and Immigration Canada; Hon. Donald S. Macdonald, Chairman, Royal Commission on the Economic Union and Development Prospects for Canada; J.A.H. Mackay, Deputy Minister, Public Works Canada; G.M. MacNabb, President, Natural Sciences and Engineering Research Council of Canada; G.W. McPherson, Chairman of the Board, Ports Canada; Robert C. Montreuil, Chairman, Canada Mortgage and Housing Corporation; Gordon Osbaldeston, Clerk of the Privy Council and Secretary to the Cabinet; W.R. Outerbridge, Chairman, National Parole Board; George Post, Deputy Minister, Department of Consumer and Corporate Affairs; Robert Rabinovitch, Deputy Minister, Department of Communications; David W. Slater, Chairman, Economic Council of Canada; Dr. Stuart L. Smith, Chairman, Science Council of Canada; and Gus Sonneveld, Acting Chairman, Livestock Feed Board of Canada.

From the Crown corporations who responded to our requests for information, we wish to thank: Elix H. Anderson, Chairman, Farm Credit Corporation Canada; H.A. Anderson, Chairman, Port Alberni Harbour Commission; Gordon Atherley, President and Chief Executive Officer, Canadian Centre for Occupational Health and Safety; Jacques Auger, President and Chief Executive Officer, Ports Canada; G.A. Berger, Assistant Deputy Minister, Operations Sector, Supply and Services Canada and President, Crown Assets Disposal Corporation; Laurent A. Bergeron, President, Canadian Arsenals Limited; A.G. Bland, President, Defence Construction Canada; R.L. Boileau, Manager, Research and Administration, Canadian National; Chris Brown, Chairman, Fraser River Harbour Commission; Ian Brown, General Manager, Toronto Harbour Commissioners; Guy Coderre, Vice-President of Human Resources and Administration, Canadian Broadcasting Corporation; Howard E. Cohen, General Manager, Harbourfront Corporation; George W. Colquhoun, Port Manager, North Fraser Harbour Commission; Jean-Claude Delorme, President and Chief Executive Officer, Teleglobe Canada; James Donnelly, President, Atomic Energy of

Canada Limited; J.T. Dunn, President and General Manager, Freshwater Fish Marketing Corporation; Arthur F. Earle, Advisor to the President, Canada Development Investment Corporation; W.H. Hopper, Chairman and Chief Executive Officer, Petro-Canada; Gorse Howarth, President, Canadian Commercial Corporation; R.A. Hubber-Richard, Chairman, Pacific Pilotage Authority Canada; W.E. Jarvis, Chief Commissioner, The Canadian Wheat Board; A.D. Latter, Chairman, Atlantic Pilotage Authority; Guy A. Lavigueur, President, Federal Business Development Bank; D.J.A. MacSween, Director General, National Arts Centre; Wilfrid Ménard, Secretary, Laurentian Pilotage Authority Canada; P. Morrison, Corporate Secretary, Northern Canada Power Commission; W.A. O'Neil, President, St. Lawrence Seaway; Francine Vallée Ouellet, Secretary of the Company, Air Canada; Ed Provost, Chairman, Canadian Film Development Corporation; Marion Ricci, Manager, Presidential Secretariat, Canadian Centre for Occupational Health and Safety; J. Smith, Chairman, Northern Canada Power Commission; J.W. Snell, Corporate Secretary, The Canadian Wheat Board; Fernand Tremblay, Chairman, National Battlefields Commission; Michael Warren, President and Chief Executive Officer, Canada Post Corporation; and William E. Wells, President, Canadian Saltfish Corporation.

Our Executive Director, Mr. Boyer, attended the fourth annual conference of the Office of the Government Ethics in Washington, D.C. on October 4, 1983, and the fifth annual conference of the Council on Governmental Ethics Laws in Montgomery, Alabama December 7 to 9, 1983, and obtained valuable information on the American experience and different approaches in dealing with conflict of interest problems. Mr. Boyer, accompanied by Assistant Deputy Registrar General Robert Boyle, also visited and interviewed Allan Gotlieb, Canadian Ambassador and a number of U.S. officials in Washington, including Mr. David Martin, Director of the Office of Government Ethics, Washington, and members of his staff; and His Honour Judge Walter B. Tamm, Chairman of the United States Judicial Ethics Committee. Jane S. Ley, staff attorney with the Office of Government Ethics provided considerable information and advice, as well as contacts with other government ethics officials in a number of States.

We also wish to acknowledge the willingness with which a number of State officials were forthcoming with materials on their laws and policies, including: R. Roth Judd, Executive Director, State of Wisconsin Ethics Board; Gordon B. Nash Jr., Chairman of the Illinois Board of Ethics; Lawrence A. Gonzalez, Executive Director, State of Florida Commission on Ethics; Susan M. Harrigan, State of California Political Fair Practices Commission; Richard J. Murphy, Director, State of New Jersey Executive Commission on Ethical Standards; Scott A. Weiner, Executive Director, State of New Jersey Election Law Enforcement

Commission; Melvin G. Cooper, Executive Director, State Ethics Commission, Alabama; Catherine O.Y. Chang, Executive Director, State Ethics Commission, Hawaii.

At the provincial level, we have received assistance from a number of officials responsible for, or knowledgeable about, conflict of interest policy including Warren Bailie, Ontario's Chief Election Officer and an executive member of the Council on Governmental Ethics Laws; Gordon H. Aiken, Q.C., Chairman of the Ontario Commission on Election Contributions and Expenses; Robert J. Fleming, director of Administration of the Ontario Legislature; Pierre-F. Côté, C.R., Le Directeur général des élections et Président de la Commission de la représentation électorale du Québec.

Other provincial officials particularly helpful in sending us information on conflict of interest laws and policies currently in force at both the provincial and municipal levels included: Hon. A.R. (Pete) Adam, Minister of Municipal Affairs, Province of Manitoba; Louis Bernard, General Secretary of the Executive Council, Government of Saskatchewan; Rosalie Curran, Secretary, Department of Municipal Affairs, Government of Newfoundland and Labrador; W.S. Deacon, Intergovernmental Relations Officer, Executive Council Office, Yukon Government; George de Rappard, Deputy Minister, Executive Council, Province of Manitoba; J.M. Fleming, Director, Municipal Services Branch, Alberta Municipal Affairs; Dave Gairns, Director of Municipal Services, Department of Municipal and Community Affairs, Yukon Government; Gerald B. Hawkins, Director, Municipal Services Branch, Department of Municipal Affairs, New Brunswick; David W. Jennings, Director of Labour Relations, Department of Treasury Board, Government of New Brunswick; Norm Macleod, Chief, Municipal Affairs Division, Northwest Territories Local Government; Harry A. Nason, Clerk of the Executive Council and Secretary to Cabinet, Government of New Brunswick; John H. Parker, Commissioner, Government of the Northwest Territories; Judith Robertson, Management Policy Advisor, Administrative Management Section, Municipal Management Policy Branch, Ministry of Municipal Affairs and Housing, Government of Ontario; Marilyn T. Singer, Executive Secretary to Minister, Department of Municipal Affairs, Province of Nova Scotia; H.D. Spray, Deputy Minister, Executive Council Office, Yukon Government; Edward Stewart, Clerk of the Executive Council, Government of Ontario; David A. Vardy, Clerk of the Executive Council and Secretary to the Cabinet, Government of Newfoundland; Tor K. Veltheim, Chairman, Saskatchewan Public Service Commission, Government of Saskatchewan; and Blenus Wright, Assistant Deputy Attorney General, Ministry of the Attorney General, Government of Ontario.

SCHEDULE B

Government Departments and Organizations Having Supplemental Codes

(Note: Since we compiled the codes for these departments, governmental reorganization has resulted in several of the following being combined.)

Agricultural Stabilization Board
 Atomic Energy Control Board
 Bureau of Pensions Advocates
 Canada Employment and Immigration Commission
 Canadian Dairy Commission
 Canadian Grain Commission
 Canadian Human Rights Commission
 Canadian Intergovernmental Conference Secretariat
 Canadian International Development Agency
 Canadian Livestock Feed Board
 Canadian Penitentiary Service (Correctional Service Canada)
 Canadian Pension Commission
 Canadian Radio-television and Telecommunications Commission
 Canadian Transport Commission
 Communications Security Establishment
 Department of Agriculture
 Department of Communications
 Department of Consumer and Corporate Affairs
 Department of Employment and Immigration
 Department of Energy, Mines and Resources
 Department of External Affairs
 Department of Finance
 Department of Fisheries and Oceans
 Department of Indian Affairs and Northern Development
 Department of Industry, Trade and Commerce
 Department of Justice
 Department of Labour
 Department of National Defence (civilian)*
 Department of National Health and Welfare
 Department of National Revenue (Customs and Excise)
 Department of National Revenue (Taxation)
 Department of Public Works
 Department of Regional Economic Expansion
 Department of Supply and Services
 Department of the Environment
 Department of the Secretary of State of Canada
 Department of the Solicitor General
 Department of Transport
 Department of Veterans Affairs
 Director of Soldier Settlement

*The Department of National Defence also has a supplemental code for members of the Canadian Armed Forces.

Economic Council of Canada
 Energy Supplies Allocation Board
 Federal-Provincial Relations Office
 Fisheries and Oceans Research Advisory Council
 Fisheries Prices Support Board
 Foreign Investment Review Agency
 Immigration Appeal Board
 Law Reform Commission of Canada
 Ministry of State for Economic Development
 Ministry of State for Science and Technology
 Ministry of State for Social Development
 National Capital Commission
 National Energy Board
 National Film Board
 National Library of Canada
 National Museums of Canada
 National Research Council of Canada
 Northern Canada Power Commission
 Northern Pipeline Agency
 Office of the Auditor General of Canada
 Office of the Governor General's Secretary
 Office of the Superintendent of Bankruptcy
 Pension Review Board
 Prairie Farm Rehabilitation Administration
 Privy Council Office
 Public Archives of Canada
 Public Service Staff Relations Board
 Registry of the Federal Court of Canada
 Restrictive Trade Practices Commission
 Royal Canadian Mounted Police (civilian)
 Social Sciences and Humanities Research Council of Canada
 Statistics Canada
 Statute Revision Commission
 Supreme Court, Staff of
 Tariff Board
 Tax Review Board (Tax Court of Canada)
 Treasury Board (Office of the Comptroller General)
 Treasury Board (Secretariat)
 Veterans Land Act, The Director
 War Veterans Allowance Board

Crown Corporations Having Supplemental Codes

Air Canada
 Atomic Energy of Canada Limited
 Bank of Canada
 Canada Council
 Canada Development Investment Corporation
 Canada Mortgage and Housing Corporation
 Canada Post Corporation
 Canadian Broadcasting Corporation
 Canadian Centre for Occupational Health and Safety

Canadian Commercial Corporation
Canadian Film Development Corporation
Canadian National Railway Company
Canadian Patents and Development Limited
Canadian Wheat Board
Cape Breton Development Corporation
Crown Assets Disposal Corporation
Defence Construction (1951) Limited
Eldorado Nuclear Limited
Export Development Corporation
Farm Credit Corporation
Federal Business Development Bank
Freshwater Fish Marketing Corporation
International Development Research Center
Laurentian Pilotage Authority
National Arts Centre Corporation
National Battlefields Commission
Northern Canada Power Commission
Oshawa Harbour Commission
Petro Canada
Ports Canada
The St. Lawrence Seaway Authority

SCHEDULE C

A. CRIMINAL CODE PROVISIONS

Section 108 Bribery of Judicial Officers, etc.

108. (1) Every one who

(a) being the holder of a judicial office, or being a member of the Parliament of Canada or of a legislature, corruptly

(i) accepts or obtains,

(ii) agrees to accept, or

(iii) attempts to obtain,

any money, valuable consideration, office, place or employment for himself or another person in respect of anything done or omitted or to be done or omitted by him in his official capacity, or

(b) gives or offers corruptly to a person who holds a judicial office, or is a member of the Parliament of Canada or of a legislature, any money, valuable consideration, office, place or employment in respect of anything done or omitted or to be done or omitted by him in his official capacity for himself or another person,

is guilty of an indictable offence and is liable to imprisonment for fourteen years.

(2) No proceedings against a person who holds a judicial office shall be instituted under this section without the consent in writing of the Attorney General of Canada.

Section 110 Frauds Upon the Government

110. (1) Every one commits an offence who

(a) directly or indirectly

(i) gives, offers, or agrees to give or offer to an official or to any member of his family, or to any one for the benefit of any official, or

(ii) being an official, demands, accepts or offers or agrees to accept from any person for himself or another person,

a loan, reward, advantage or benefit of any kind as

consideration for cooperation, assistance, exercise of influence or an act or omission in connection with

- (iii) the transaction of business with or any matter of business relating to the government, or
- (iv) a claim against Her Majesty or any benefit that Her Majesty is authorized or is entitled to bestow,

whether or not, in fact, the official is able to cooperate, render assistance, exercise influence or do or omit to do what is proposed, as the case may be;

(b) having dealings of any kind with the government, pays a commission or reward to or confers an advantage or benefit of any kind upon an employee or official of the government with which he deals, or to any member of his family, or to any one for the benefit of the employee or official, with respect to those dealings, unless he has the consent in writing of the head of the branch of government with which he deals, the proof of which lies upon him;

(c) being an official or employee of the government, demands, accepts or offers or agrees to accept from a person who has dealings with the government a commission, reward, advantage or benefit of any kind directly or indirectly, by himself or through a member of his family or through any one for his benefit, unless he has the consent in writing of the head of the branch of government that employs him or of which he is an official, the proof of which lies upon him;

(d) having or pretending to have influence with the government or with a minister of the government or an official, demands, accepts or offers or agrees to accept for himself or another person a reward, advantage or benefit of any kind as consideration for cooperation, assistance, exercise of influence or an act or omission in connection with

- (i) anything mentioned in subparagraph (a) (iii) or (iv), or
- (ii) the appointment of any person, including himself, to an office;

(e) offers, gives or agrees to offer or give to a minister of the government or an official a reward, advantage or benefit of any kind as consideration for cooperation, assistance, exercise of influence or an act or omission in connection with

- (i) anything mentioned in subparagraph (a)(iii) or (iv), or
- (ii) the appointment of any person, including himself, to an office; or

(f) having made a tender to obtain a contract with the government

- (i) gives, offers or agrees to give to another person who has made a tender, or to a member of his family, or to another person for the benefit of that person, a reward, advantage or benefit of any kind as consideration for the withdrawal of the tender of that person, or
- (ii) demands, accepts or agrees to accept from another person who has made a tender a reward, advantage or benefit of any kind as consideration for the withdrawal of his tender.

(2) Every one commits an offence who, in order to obtain or retain a contract with the government, or as a term of any such contract, whether express or implied, directly or indirectly subscribes, gives, or agrees to subscribe or give, to any person any valuable consideration

(a) for the purpose of promoting the election of a candidate or a class or party of candidates to the Parliament of Canada or a legislature, or

(b) with intent to influence or affect in any way the result of an election conducted for the purpose of electing persons to serve in the Parliament of Canada or a legislature.

(3) Every one who commits an offence under this section is guilty of an indictable offence and is liable to imprisonment for five years.

Section 297: Public Servant Refusing to Deliver Property

297. Every one who, being or having been employed in the service of Her Majesty in right of Canada or in right of a province, or in the service of a municipality, and entrusted by virtue of that employment with the receipt, custody, management or control of anything, refuses or fails to deliver it to a person who is authorized to demand it and does demand it, is guilty of an indictable offence and is liable to imprisonment for fourteen years.

Section 357: False Return by Public Officer

357. Every one who, being entrusted with the receipt, custody or management of any part of the public revenues, knowingly furnishes a false statement or return of

(a) any sum of money collected by him or entrusted to his care, or

(b) any balance of money in his hands or under his control, is guilty of an indictable offence and is liable to imprisonment for five years.

Section 682: Public Office Vacated on Conviction

(1) Where a person is convicted of an indictable offence for which he is sentenced to imprisonment for a term exceeding five years and holds, at the time he is convicted, an office under the Crown or other public employment, the office or employment forthwith becomes vacant.

(2) A person to whom subsection (1) applies is, until he undergoes the punishment imposed upon him or the punishment substituted therefore by competent authority or receives a free pardon from Her Majesty, incapable of holding any office under the Crown or other public employment, or of being elected or sitting or voting as a member of the Parliament of Canada or of a legislature or of exercising any right of suffrage.

682. (3) No person who is convicted of an offence under section 110,has, after that conviction, capacity to contract with Her Majesty or to receive any benefit under a contract between Her Majesty and any other person or to hold office under Her Majesty.

(3.1) A person to whom subsection (3) applies may, at any time before a pardon is granted to him under section 4 of the Criminal Records Act, apply to the Governor in Council for the restoration of one or more of the capacities lost by him by virtue of that subsection.

(3.2) Where an application is made under subsection (3.1), the Governor-in-Council may order that the capacities lost by the applicant by virtue of subsection (3) be restored to him in whole or in part and subject to such conditions as he considers desirable in the public interest.

(4) Where a conviction is set aside by competent authority any disability imposed by this section is removed.

B. CRIMINAL OFFENCES IN OTHER STATUTES(1) Immigration Act, 1976Section 98: Offences respecting immigration officers and adjudicators

98. Every person who

- (a) being an immigration officer or an adjudicator, wilfully makes or issues any false document or statement in respect of any matter relating to his duties under this Act, or accepts, agrees to accept or induces or assists any other person to accept any bribe or other benefit in respect of any matter relating to his duties under this Act or otherwise wilfully fails to perform his duties under this Act,
- (b) being an immigration officer or an adjudicator, contravenes any provision of this Act or the regulations or knowingly induces, aids or abets or attempts to induce, aid or abet any other person to do so,
- (c) gives, offers or promises to give any bribe or consideration of any kind to, or makes any agreement or arrangement with, an immigration officer or an adjudicator to induce him in any way not to perform his duties under this Act,
- (d) not being an immigration officer or an adjudicator, impersonates or holds himself out to be an immigration officer or an adjudicator, or takes or uses any name, title, uniform or description or otherwise acts in any manner that may reasonably lead any person to believe that he is an immigration officer or an adjudicator, or
- (e) obstructs or impedes an immigration officer or an adjudicator in the performance of his duties under this Act,

is guilty of an offence and is liable,

- (f) on conviction on indictment, to a fine not exceeding ten thousand dollars or to imprisonment for a term not exceeding five years or to both, or
- (g) on summary conviction, to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months or to both.

Section 99: General Punishment

99. Every person who knowingly contravenes any provision of this Act or the regulations or any order or direction lawfully made or given thereunder for which no punishment is elsewhere provided in this Act is guilty of an offence and is liable on summary conviction to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months or to both.

(2) Financial Administration Act, Part XI

Section 92: Offences

92. Every officer or person acting in any office or employment connected with the collection, management or disbursement of public money who
- (a) receives any compensation or reward for the performance of any official duty, except as by law prescribed,
 - (b) conspires or colludes with any other person to defraud Her Majesty, or makes opportunity for any person to defraud Her Majesty,
 - (c) designedly permits any violation of the law by any other person,
 - (d) wilfully makes or signs any false entry in any book, or wilfully makes or signs any false certificate or return in any case in which it is his duty to make an entry, certificate or return,
 - (e) having knowledge or information of the violation of any revenue law by any person, or of fraud committed by any person against Her Majesty, under any revenue law of Canada, fails to report, in writing, such knowledge or information to his superior officer, or
 - (f) demands or accepts or attempts to collect, directly or indirectly, as payment or gift or otherwise, any sum of money, or other thing of value, for the compromise, adjustment or settlement of any charge or complaint for any violation or alleged violation of law,

is guilty of an indictable offence, and is liable on conviction to a fine not exceeding five hundred dollars, and to imprisonment for any term not exceeding five years.

Section 93: Bribes

93. Every person who

(a) promises, offers, gives any bribe to any officer or any person acting in any office or employment connected with the collection, management or disbursement of public money, with intent

(i) to influence his decision or action on any question or matter that is then pending, or may, by law, be brought before him in his official capacity, or

(ii) to influence such officer or person to commit, or aid or abet in committing any fraud on the revenue, or to connive at, collude in, or allow or permit any opportunity for the commission of any such fraud, or

(b) accepts or receives any such bribe,

is guilty of an indictable offence, and is liable on conviction to a fine not exceeding three times the amount so offered or accepted, and to imprisonment for any term not exceeding five years.

(3) Unemployment Insurance Act, Part V

Section 114: Confidential information

114. Information, written or oral, obtained by the Commission or the Department of Employment and Immigration from any person under this Act or any regulation thereunder shall be made available only to the employees of the Commission or the said Department in the course of their employment and such other persons as the Minister deems advisable, and neither the Commission, the said Department, nor any of their employees is compellable to answer any question concerning such information, or to produce any records or other documents containing such information as evidence in any proceedings not directly concerned with the enforcement or interpretation of this Act, or the regulations.

Section 123: Contravention of Act

123. (1) Every person who contravenes or fails to comply with any provision of this Act or the regulations is guilty of an offence.

Section 124: Offences generally

124. Every person who is guilty of an offence under this Act for which no penalty is provided is liable on summary conviction to a fine not exceeding five hundred dollars or to imprisonment for a term not exceeding six months or to both.

(4) Income Tax Act, Part XVSection 241: Communication of Information

241. (1) Except as authorized by this section, no official or authorized person shall

- (a) knowingly communicate or knowingly allow to be communicated to any person any information obtained by or on behalf of the Minister for the purposes of this Act, or
 - (b) knowingly allow any person to inspect or to have access to any book, record, writing, return or other document obtained by or on behalf of the Minister for the purposes of this Act.
- (9) Every person
- (a) who, being an official or authorized person, contravenes subsection (1), or
 - (b) to whom information has been provided pursuant to subsection (4) who uses, communicates or allows to be communicated such information for any purpose other than for which it was provided, is guilty of an offence and is liable on summary conviction to a fine not exceeding \$1,000 or to imprisonment for a term not exceeding 2 months or to both such fine and imprisonment.

C. CIVIL LIABILITY UNDER CERTAIN STATUTES(1) Financial Administration Act, Part XISection 89: Notice to persons failing to pay over public money

89. (1) Whenever the Receiver General has reason to believe that any person
- (a) has received money for Her Majesty and has not duly paid it over,

- (b) has received money for which he is accountable to Her Majesty and has not duly accounted for it, or
- (c) has in his hands any public money applicable to any purpose and has not duly applied it,

the Receiver General may cause a notice to be served on such person, or on his representative in case of his death, requiring him within such time from the service of the notice as may be named therein, duly to pay over, account for, or apply such money, as the case may be, and to transmit to the Receiver General proper vouchers that he has done so.

(2) Where a person has failed to comply with a notice served on him under subsection (1) within the time stated therein, the Receiver General shall state an account between such person and Her Majesty, showing the amount of the money not duly paid over, accounted for or applied, as the case may be, and, in the discretion of the Receiver General, charging interest on the whole or any part thereof at the rate of five per cent per annum from such date as the Receiver General may determine, and in any proceedings for the recovery of such money a copy of the account stated by the Receiver General, certified by him, is evidence that the amount stated therein, together with interest, is due and payable to Her Majesty, without proof of the signature of the Receiver General or his official character, and without further proof thereof, and such amount and interest may be recovered as a debt due to Her Majesty.

Section 90: Evidence

90. Where it appears

- (a) by the books or accounts kept by or in the office of any person employed in the collection or management of the revenue,
- (b) in any accounting by such person, or
- (c) by his written acknowledgement or confession,

that such person, has, by virtue of his office or employment, received money belonging to Her Majesty and has refused or neglected to pay over such money to the proper persons at the proper times, an affidavit deposing to such facts, taken by any person having knowledge thereof, shall, in any proceedings for the recovery of such money, be received in evidence and is prima facie proof of the facts stated therein.

Section 91: Liability for loss

91. Where by reason of any malfeasance, wilful neglect of duty or gross negligence by any person employed in collecting or receiving any public money, any sum of money is lost to Her Majesty, that person is accountable for such sum as if he had collected and received it and it may be recovered from him as if he had collected and received it.

D. STATUTORY PROVISIONS ADDRESSING CONFLICT OF INTEREST MATTERS

(1) National Energy Board Act

The following is the full text of section 3(5) of the National Energy Board Act which is cited in the report:

3.(5) A person is not eligible to be appointed or to continue as a member of the Board if he is not a Canadian citizen or if as owner, shareholder, director, officer, partner or otherwise, he is engaged in the business of producing, selling, buying, transmitting, exporting, importing or otherwise dealing in hydrocarbons or power or if he holds any bond, debenture or other security of a company.

E. CONFLICT OF INTEREST PROVISIONS RELATING TO MEMBERS OF PARLIAMENT

(1) Standing Orders of the House of Commons

- No. 14 No member is entitled to vote upon any question in which he or she has a direct pecuniary interest, and the vote of any member so interested will be disallowed.
- No. 83 The offer of any money or other advantage to any member of this House, for the promoting of any matter whatsoever depending or to be transacted in Parliament, is a high crime and misdemeanour, and tends to the subversion of the constitution.
- No. 84 If it shall appear that any person has been elected and returned a member of this House, or has endeavoured so to be, by bribery or any other corrupt practices, this House will proceed with the utmost severity against all such persons as shall have been wilfully concerned in such bribery or other corrupt practices.

(2) Beauchesne's Parliamentary Rules and Forms (1978)Section 824: Offer of Bribe

824. Standing Order 83 is founded upon a resolution passed by Parliament in England on May 2, 1695. In the spirit of this resolution, the offer of a bribe in order to influence a Member in any of the proceedings of the House, or of a committee, has been treated as a breach of privilege, being an insult not only to the Member himself but also to the House. Sir Erskine May, *Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (19th ed., 1976), p. 149.

Section 825: Acceptance of Bribe or Fees

825. (1) The acceptance of a bribe by a Member is an offence under s.108 of the Criminal Code, R.S.C. 1970, c.C-34.
- (2) The acceptance of fees by Members for professional services connected with any proceedings or measures of Parliament, is also forbidden under the spirit of this rule, nor is it consistent with parliamentary or professional usage for a Member to advise as a paid counsel upon any private bill before Parliament. Sir John Bourinot, *Parliamentary Procedure and Practice in the Dominion of Canada* (4th ed., 1916), pp. 57-8.

Section 826: Corrupt Electoral Practices

826. Matters concerning corrupt practices during elections are the subject of ss.65 to 90 of the Canada Elections Act, R.S.C. 1970, c.14, (1st Supp.).

(3) Senate and House of Commons ActIndependence of Parliament

(This subsection (3) is also known as Appendix I to the Conflict of Interest Guidelines for Ministers of the Crown in Schedule D, A., of this report)

Members of the House of Commons

10. Except as hereinafter specially provided,

- (a) no person accepting or holding any office, commission or employment, permanent or temporary, in the service of the Government of Canada, at the nomination of the Crown or at the nomination of any of the officers of the

Government of Canada, to which any salary, fee, wages, allowance, emolument, or profit of any kind is attached, and

- (b) no sheriff, registrar of deeds, clerk of the peace, or county crown attorney in any of the provinces of Canada,

is eligible as a member of the House of Commons, or shall sit or vote therein.

11. Nothing in section 10 renders ineligible any person holding any office, commission or employment, permanent or temporary, in the service of the Government of Canada, at the nomination of the Crown, or at the nomination of any of the officers of the Government of Canada, as a member of the House of Commons, or disqualifies him from sitting or voting therein, if, by his commission or other instrument of appointment, it is declared or provided that he shall hold such office, commission or employment without any salary, fees, wages, allowances, emolument or other profit of any kind, attached thereto.

12. Nothing in this Act renders ineligible or disqualifies any person as a member of the House of Commons or to sit or vote therein by reason of his being

- (a) a member of Her Majesty's forces while he is on active service as a consequence of war, or
- (b) a member of the reserve force of the Canadian Forces who is not on full-time service other than active service as a consequence of war.

13. Notwithstanding anything in this Act, a member of the House of Commons shall not vacate his seat by reason only of his acceptance of an office of profit under the Crown, if that office is an office the holder of which is capable of being elected to, or sitting or voting in, the House of Commons.

14. A person is not, by this Act, rendered ineligible as a member of the House of Commons or disqualified from sitting or voting in the House of Commons by reason only of his acceptance of travelling expenses paid out of public moneys of Canada where the travel is undertaken at the request of the Governor-in-Council on the public business of Canada.

15. A member of the Queen's Privy Council for Canada is not, by this Act, rendered ineligible as a member of the House of Commons or disqualified from sitting or voting in the House of Commons by reason only that he

- (a) holds an office for which a salary is provided in section 4 or 5 of the Salaries Act and receives that salary, or
- (b) is a Minister of State, other than a Minister of State referred to in section 5 of the Salaries Act, or a Minister without Portfolio and receives a salary in respect of that position,

if he is elected while he holds that office or position or is a member of the House of Commons at the date of his nomination by the Crown for that Office or position.

16. No person, directly or indirectly, alone or with any other, by himself or by the interposition of any trustee or third party, holding or enjoying, undertaking or executing any contract or agreement, expressed or implied, with or for the Government of Canada on behalf of the Crown, or with or for any of the officers of the Government of Canada, for which any public money of Canada is to be paid, is eligible as a member of the House of Commons, or shall sit or vote in the said House.

17. If any member of the House of Commons accepts any office or commission, or is concerned or interested in any contract, agreement, service or work that, by this Act, renders a person incapable of being elected to, or of sitting or voting in the House of Commons, or knowingly sells any goods, wares or merchandise to, or performs any service for the Government of Canada, or for any of the officers of the Government of Canada, for which any public money of Canada is paid or to be paid, whether such contract, agreement or sale is expressed or implied, and whether the transaction is single or continuous, the seat of such member is thereby vacated, and his election is thenceforth void.

18. (1) If any person disqualified or by this Act declared incapable of being elected to, or of sitting or voting in the House of Commons, or if any person duly elected, who has become disqualified to continue to be a member or to sit or vote, under section 17, nevertheless sits or votes, or continues to sit or vote therein, he shall thereby forfeit the sum of two hundred dollars for each and every day on which he so sits or votes.

(2) Such sum is recoverable from him by any person who sues for the same in any court of competent civil jurisdiction in Canada.

19. Sections 16, 17 and 18 extend to any transaction or act begun and concluded during a recess of Parliament.

20. (1) In every contract, agreement or commission to be made, entered into or accepted by any person with the Government of Canada, or any of the departments or officers of the Government of Canada, there shall be inserted an express condition, that no member of the House of Commons shall be admitted to any share or part of such contract, agreement or commission, or to any benefit to arise therefrom.

(2) In case any person, who has entered into or accepted, or who shall enter into or accept any such contract, agreement or commission, admits any member or members of the House of Commons, to any part or share thereof, or to receive any benefit thereby, every such person shall, for every such offence, forfeit and pay the sum of two thousand dollars, recoverable with costs in any court of competent jurisdiction by any person who sues for the same.

21. This Act does not extend to disqualify any person as a member of the House of Commons by reason of his being

- (a) a shareholder in any incorporated company having a contract or agreement with the Government of Canada, except any company that undertakes a contract for the building of any public work;
- (b) a person on whom the completion of any contract or agreement, expressed or implied, devolves by descent or limitation, or by marriage, or as devisee, legatee, executor or administrator, until twelve months have elapsed after the same has so devolved on him; or
- (c) a contractor for the loan of money or of securities for the payment of money to the Government of Canada under the authority of Parliament, after public competition, or respecting the purchase or payment of the public stock or debentures of Canada, on terms common to all persons.

Members of the Senate

22. (1) No person, who is a member of the Senate, shall directly or indirectly, knowingly and wilfully be a party to or be concerned in any contract under which the public money of Canada is to be paid.

(2) If any person, who is a member of the Senate, knowingly and wilfully becomes a party to or concerned in any such contract, he shall forfeit the sum of two hundred dollars for each and every day during which he continues to be such party or so concerned.

(3) Such sum is recoverable from him by any person who sues for the same, in any court of competent jurisdiction in Canada.

(4) This section does not render any senator liable for such penalties, by reason of his being a shareholder in any incorporated company having a contract or agreement with the Government of Canada, except any company that undertakes a contract for the building of any public work.

(5) This section does not render any senator liable for such penalties by reason of his being, or having been, a contractor for the loan of money or of securities for the payment of money to the Government of Canada under the authority of Parliament, after public competition, or by reason of his being, or having been, a contractor respecting the purchase or payment of the public stock or debentures of Canada, on terms common to all persons.

Members of the Senate and the House of Commons

23. (1) No member of the Senate or of the House of Commons shall receive or agree to receive any compensation, directly or indirectly, for services rendered, or to be rendered, to any person, either by himself or another, in relation to any bill, proceeding, contract, claim, controversy, charge, accusation, arrest or other matter before the Senate or the House of Commons, or before a committee of either House, or in order to influence or to attempt to influence any member of either House.

(2) Every member of the Senate offending against this section is liable to a fine of not less than one thousand dollars and not more than four thousand dollars; and every member of the House of Commons offending against this section is liable to a fine of not less than five hundred dollars and not more than two thousand dollars, and shall for five years after conviction of such offence, be disqualified from being a member of the House of Commons, and from holding any office in the public service of Canada.

(3) Any person who gives, offers, or promises to any such member any compensation for such services as aforesaid, rendered or to be rendered, is guilty of an indictable offence, and liable to one year's imprisonment and to a fine of not less than five hundred dollars and not more than two thousand dollars.

Limitation of Actions

24. No person is liable to any forfeiture or penalty imposed by this Act, unless proceedings are taken for the recovery thereof within twelve months after such forfeiture or penalty has been incurred.

F. PROVISIONS OF THE PUBLIC SERVICE EMPLOYMENT ACT

Political Partisanship

32. (1) No deputy head and, except as authorized under this section, no employee, shall

- (a) engage in work for, on behalf of or against a candidate for election as a member of the House of Commons, a member of the legislature of a province or a member of the Council of the Yukon Territory or the Northwest Territories, or engage in work for, on behalf of or against a political party; or
- (b) be a candidate for election as a member described in paragraph (a).

(2) A person does not contravene subsection (1) by reason only of his attending a political meeting or contributing money for the funds of a candidate for election as a member described in paragraph (1)(a) or money for the funds of a political party.

(3) Notwithstanding any other Act, upon application made to the Commission by an employee the Commission may, if it is of the opinion that the usefulness to the Public Service of the employee in the position he then occupies would not be impaired by reason of his having been a candidate for election as a member described in paragraph (1)(a), grant to the employee leave of absence without pay to seek nomination as a candidate and to be a candidate for election as such a member, for a period ending on the day on which the results of the election are officially declared or on such earlier day as may be requested by the employee if he has ceased to be a candidate.

(4) Forthwith upon granting any leave of absence under subsection (3), the Commission shall cause notice of its action to be published in the Canada Gazette.

(5) An employee who is declared elected as a member described in paragraph (1)(a) thereupon ceases to be an employee.

(6) Where any allegation is made to the Commission by a person who is or has been a candidate for election as a member described in paragraph (1)(a), that a deputy head or employee has contravened subsection (1), the allegation shall be referred to a board established by the Commission to conduct an inquiry at which the person making the allegation and the deputy head or employee

concerned, or their representatives, are given an opportunity of being heard, and upon being notified of the board's decision on the inquiry the Commission,

- (a) in the case of a deputy head, shall report the decision to the Governor-in-Council who may, if the board has decided that the deputy head has contravened subsection (1), dismiss him; and
- (b) in the case of an employee, may, if the board has decided that the employee has contravened subsection (1), dismiss the employee.

(7) In the application of subsection (6) to any person, the expression "deputy head" does not include a person for whose removal from office, otherwise than by the termination of his appointment at pleasure, express provision is made by this or any other Act.

SCHEDULE D

A. CONFLICT OF INTEREST GUIDELINES FOR MINISTERS OF THE CROWN

I. Principles

- 1) The onus for preventing real, apparent or foreseeable conflicts of interest rests with the individual.
- 2) Ministers must perform and appear to perform their official responsibilities and arrange their private affairs in a manner that will conserve and enhance public confidence and trust in government and that will prevent conflicts of interest from arising.
- 3) Ministers must not take advantage or appear to take advantage of their official positions, or of information obtained in the course of their official duties that is not generally available to the public.

The purpose of these Guidelines is to assist Ministers in observing these principles and in maintaining the high standard of conduct expected of them. As the Guidelines are general in nature, conforming to the letter of them may not afford complete protection for individual Ministers in all cases. Each Minister is therefore responsible for taking whatever additional action may be necessary to ensure that conflicts of interest are avoided.

II. Prohibited Activities

Ministers upon appointment, or as soon as possible thereafter, shall cease to:

- 1) engage in the practice of a profession or the management or operation of any business or commercial activity, or in the management of assets except exempt or discloseable assets;
- 2) serve as paid consultants;
- 3) retain or accept directorships or offices in commercial corporations. Although it could be proper in some circumstances for Ministers to retain or accept directorships or offices in organizations of a philanthropic or charitable character, great care must always be taken to prevent conflicts of interest from arising. Offers

of directorships or offices in philanthropic or charitable organizations in receipt of federal public funds should be refused;

- 4) serve actively as members in unions or professional associations.

Each Minister will provide to the Assistant Deputy Registrar General (ADRG) for disclosure in the Public Registry information concerning the partnerships, directorships and corporate executive positions held by them during the two years preceding their appointment. These disclosures will provide sufficient information to identify the nature of the business involved and of the responsibilities carried.

III. Avoidance of Preferential Treatment

Ministers shall not accord preferential treatment in relation to any official matter to relatives or friends or to organizations in which their relatives or friends have an interest.

Ministers must also take care to avoid placing, or appearing to place, themselves under an obligation to any person or organization which might profit from special consideration or favour on their part.

IV. Gifts

Ministers shall disclose in the Public Registry any personal gift or other benefit of a value exceeding two hundred dollars which they receive from any person not connected with them by blood relationship, marriage or adoption, together with the name and address of the donor. Official gifts and hospitality received from other governments and hospitality received from personal friends are not subject to this rule. All gifts or benefits exceeding two hundred dollars in value, other than official gifts or benefits, are to be declared to the ADRG within thirty days of their receipt for disclosure in the Public Registry.

V. Arrangements with Respect to Assets

At the time of their appointment to the Cabinet or upon the coming into force of these guidelines, Ministers shall make a full report to the Prime Minister, through the Assistant Deputy Registrar General (ADRG), of all their assets and liabilities. These reports will be updated by annual reports submitted by Ministers through the same channel, indicating changes in the

assets, other than exempt assets, owned directly by them. These annual reports will include information about changes in the liabilities owed by Ministers.

A Exempt Assets

There are no requirements of public disclosure or restrictions on dealing with property which is for the personal use of Ministers and their families or with other assets not of a commercial character ("exempt assets"). Exempt assets include: residences and recreational property used or intended for use by Ministers or their families; household goods and personal effects; automobiles; boats and other means of transport for personal use; and works of art. They also include cash and deposits (but do not include cash and deposits in foreign currency held for investment or speculative purposes); Canada and provincial savings bonds; registered retirement savings plans that are not self-administered; self-administered registered retirement savings plans composed exclusively of exempt assets; registered home ownership savings plans; investments in open ended mutual funds; guaranteed investment certificates and similar financial instruments; income averaging and other annuities; accrued pension rights; life insurance policies; money owed by a previous employer, client or partnership; personal loans to any individual connected with a Minister by blood relationship, marriage or adoption; and personal loans not in excess of \$5,000 to any individual not connected with a Minister by blood relationship, marriage or adoption.

B Discloseable Assets

Ministers may elect to disclose in the Public Registry the following assets owned by them when these assets are of such a nature that they are unlikely to give rise to a conflict of interest:

- 1) ownership interests in family businesses, and in companies whose stocks and shares are not traded publicly, which do not contract with the government, which are of a local character, and which do not own or control shares of public companies;
- 2) farms;
- 3) real property other than exempt property not normally for the minister's or his family's personal use and which is unlikely to create a conflict of interest;

- 4) beneficial ownership of the assets of trusts other than blind trusts of which the administration is carried out at arm's length.

If Ministers do not elect to disclose non-conflicting assets in the Public Registry, these assets must be treated as "controlled assets". Initial reports of such assets shall be made by the Minister to the ADRG within 60 days of the Minister's appointment to the Cabinet, for the purpose of disclosure in the Public Registry. Information about any sale, purchase or acquisition through other means of assets of this character made subsequent to any initial report must be provided by the Minister to the ADRG within 30 days after the transaction has been completed for disclosure in the Public Registry. The information provided in these initial and subsequent disclosures will be open to public examination.

C Controlled Assets

All assets other than exempt or discloseable assets owned by a Minister shall be considered controlled assets and shall be either sold in a normal arm's length transaction or placed in a blind trust. Ministers may not after the completion of any arrangements necessary to comply with the Guidelines, purchase, sell or retain any direct interest in any controlled asset. If Ministers should acquire controlled assets through inheritance or gift after their arrangements have been completed, this shall be reported to the Prime Minister and either sold or placed in a blind trust.

Controlled assets include:

- 1) publicly traded securities of corporations and governments;
- 2) interests in partnerships, proprietorships, joint ventures, private companies and family businesses which are not discloseable assets;
- 3) stock options except those of private companies referred to in item 1) under Discloseable Assets;
- 4) self-administered registered retirement savings plans, except those composed exclusively of exempt assets;
- 5) real property which is not an exempt or discloseable asset;
- 6) commodities, including metals, and foreign currency for speculative or investment purposes;

- 7) interests in profit sharing plans;
- 8) loans that exceed \$5,000 to individuals not connected with the Minister concerned by blood relationship, marriage or adoption.

1) Divestment - Selling

Ministers may sell controlled assets in a normal arm's length transaction but only for the purpose of complying with these Guidelines and within the time limits prescribed in them.

2) Divestment - Blind Trust

Controlled assets that are not sold must be placed in a blind trust. The following criteria shall be observed in establishing blind trusts to comply with these Guidelines:

- 1) title to all assets placed in trust must be transferred to the trustee(s);
- 2) all trustees of such trusts shall be individuals, corporations or firms that deal with the Minister at arm's length (as this term is defined in the Income Tax Act of Canada). This means that individuals connected with a Minister by blood relationship, marriage or adoption cannot serve as trustees;
- 3) while there shall be no limit on the number of trustees that may be appointed, every trust must have at least one "government designated trustee" (all trust companies in possession of a valid licence and designated investment dealers);
- 4) all decisions of the trustees of a blind trust must be approved by a majority of the trustees which majority must include the government designated trustee;
- 5) subject to the requirements of 2, 3 and 4 above, a Minister may appoint as many independent trustees as he wishes;
- 6) the terms of each instrument shall place on the trustee(s) a clear responsibility not to divulge to, or otherwise inform, directly or indirectly, the Minister of any matter concerning the assets in or the management of the trust, except as hereinafter provided;

- 7) the trustee(s) of each trust must be empowered to make all decisions concerning the management of the assets in the trust free of direct or indirect control or influence of direct or indirect control or influence by the Minister, and without informing, consulting with or seeking advice from the Minister;
- 8) each trust instrument shall provide that the trustee(s) must deliver annual statements to the minister that will permit the preparation of annual income tax returns, or compliance with any other legislation or legal requirements;
- 9) any trust instrument may provide that the Minister be informed of the total value of the trust fund at any time, but such information and the statements referred to in item 8) above, must not disclose to the Minister the identity, nature, or value of any of the assets in the trust;
- 10) the terms of any blind trust instrument may provide that the net income of the trust fund be paid to the Minister at such intervals as may be agreed with the trustee(s);
- 11) the Minister may request the trustee(s) to pay to him or her such part of the capital of the trust fund, in cash and not in specie, as he or she may direct;
- 12) the Minister may add capital to the trust at any time during the life of the trust.

NOTE: Ministers may name persons other than themselves as beneficiaries of their blind trust, in which event these criteria apply mutatis mutandis to Ministers and the beneficiaries.

Within the period stipulated in these Guidelines, a copy of any blind trust instrument entered into by a Minister for the purposes of these Guidelines must be provided to the ADRG.

The deadline for receipt of these instruments may be extended by the Prime Minister in special circumstances.

3) Holding Companies

In cases where Ministers have established holding companies for estate planning purposes, they may put their rights in such companies into a trust for retention. In such

circumstances, the trustee may not dispose of or otherwise affect the rights placed in the trust. The Assistant Deputy Registrar General may serve as trustee of such trusts.

In establishing such trusts, Ministers may make arrangements to have third parties exercise their voting rights in relation to the shares in the holding company as long as such arrangements will not result in a conflict of interest. Ministers who have established such trusts may not be consulted or informed of the disposition of any assets owned by the holding company that would be considered to be controlled assets under the terms of these Guidelines.

VI. Executorships and Trusteeships

Ministers are to disclose to the Prime Minister through the ADRG, all executorships and trusteeships and are to take appropriate steps to avoid conflicts of interest that might arise from serving actively as executor or trustee.

VII. Spouses and Dependent Children

These Guidelines do not directly apply to spouses or dependent children of Ministers. It goes without saying that Ministers must not transfer their assets to their spouses or dependent children with a view to avoiding the requirements of these Guidelines. Ministers should also bear in mind their individual responsibility to prevent conflicts of interest, including those that might conceivably arise or appear to arise out of dealings in property or investments which are owned or managed in whole or in part, by their spouses or dependent children.

VIII. Administration

These Guidelines are administered on behalf of the Prime Minister by the Assistant Deputy Registrar General (ADRG). The ADRG will assist Ministers in complying with these Guidelines and will provide them with information and advice for this purpose.

Ministers must fully declare on a confidential basis their assets, liabilities and activities, including executorships and trusteeships, to the ADRG within 60 days of appointment to the Cabinet or of the coming into force of these Guidelines.

In order that the ADRG may assure Ministers that their trust instruments conform to the criteria set out in the guidelines and will be satisfactory to the Prime Minister, trust instruments are to be submitted to the ADRG before they are executed.

Ministers must complete all arrangements necessary to achieve full compliance within 120 days of appointment or of the coming into force of these Guidelines. Within this time period, Ministers must provide to the ADRG copies of duly executed trust instruments and public disclosures of previous activities, personal gifts or benefits and discloseable assets, as required, and a public document in which they will indicate in summary form the arrangements they have made to comply with these Guidelines. The public disclosures of previous activities, personal gifts or benefits and discloseable assets and the summary of arrangements made by a Minister will be open to examination by the general public in the Public Registry maintained by the ADRG.

If questions related to compliance with these Guidelines cannot be resolved between a Minister and the ADRG, the matter will be referred by the ADRG or the Minister concerned to an advisory committee composed of the Clerk of the Privy Council and the Prime Minister's Principal Secretary for an opinion. Questions regarding the application of the Guidelines to unusual situations will be referred to the Prime Minister through the advisory committee.

A Minister's conflict of interest arrangements will be considered complete when approved by the Prime Minister.

IX. Other Requirements

Conflict of Interest Rules for Parliamentarians

Ministers are subject, in addition to these Guidelines, to the provisions of the Senate and House of Commons Act as they apply to Senators and Members of Parliament. Attention is drawn, in particular, to the conflict of interest provisions of these Acts (Attached as Appendix I). These are reproduced in section E (3) of Schedule C of this report. They relate to incompatible offices, prohibited contracts with the government and prohibitions on fees received for influencing other Parliamentarians.

Post-Employment Guidelines

Ministers are also asked to comply with the Post-Employment Guidelines, attached as Appendix II.* These are reproduced in section B of this Schedule D which follows.

B. POST-EMPLOYMENT GUIDELINES FOR MINISTERS

The following is the text of the Post-Employment Guidelines for Ministers:

A. Guidelines for Ministers

- 1) Ministers should not allow themselves to be influenced in their pursuit of their official duties by plans for or offers of outside employment:
 - a) Ministers should disclose to the Prime Minister all serious offers of positions outside Government service which in their judgement put them in a position of a real or apparent conflict of interest;
 - b) Ministers should not accept any offers of employment outside Government service without first informing the Prime Minister;
 - c) Ministers should, in seeking employment or an occupation outside Government service or in preparing themselves for commercial activities after they will have left Government service, ensure that these endeavours do not lead to real or apparent conflicts of interest or in any way interfere with their official duties.

2) In any official dealings with former office holders, Ministers must ensure that they do not provide grounds or the appearance of grounds for allegations of improper influence, privileged access or preferential treatment.

B. Guidelines Applying to Employment and Commercial Activities of Former Ministers

The following guidelines are pursuant to the principles set out in the Conflict of Interest Guidelines, and are to be applied in accordance with those principles and with the aim of protecting the individual liberty of former Ministers to the fullest extent possible.

These guidelines do not apply to former Ministers who remain in the Senate or House of Commons to the extent that they would impede the performance of their duties as Parliamentarians, but in such circumstances the former Minister must take care to follow the appropriate Parliamentary laws, rules and conventions relating to conflict of interest.

- 1) Within a period of two years of leaving office, ministers should not:
 - a) accept appointment to a board of directors of a commercial corporation which, as a matter of

course, was in a special relationship with the department or agency for which they were responsible on an ongoing basis during the last two years of their participation in the Ministry;

- b) change sides to act for or on behalf of any person or commercial corporation in connection with any specific proceeding, transaction, case or other matter to which the Government of Canada is a party and in which they had a personal and substantial involvement on behalf of the Government during the last two years of their participation in the Ministry;
- c) lobby for or on behalf of any person or commercial corporation before any department or agency for which they were responsible on an ongoing basis during the last two years of their participation in the Ministry.

2) Within the period of one year of leaving office, Ministers should not:

- a) accept employment with a commercial corporation with which they had significant direct official dealings as Ministers during the last year of their participation in the Ministry;
- b) change sides to act for or on behalf of any person or commercial corporation in connection with any specific proceeding, case, transaction or other matter which fell under their authority during the last year of their participation in the Ministry;
- c) give counsel for commercial purposes concerning the programs or policies of the department or agency for which they were responsible on an ongoing basis, or with which they had a direct and substantial relationship during the last year of their participation in the Ministry;

NOTES: For these purposes "department or agency" includes Crown corporations but not quasi-judicial bodies. "Special relationship" in respect of paragraph 1(a) means regulation of the corporation by the department or agency, receipt by the corporation of subsidies, loans or other capital assistance from the department or agency, and

contractual relationships between the corporation and the department or agency.

C. GUIDELINES FOR PARLIAMENTARY SECRETARIES

The text of the Prime Minister's letter to Parliamentary Secretaries is as follows:

I am writing to bring to your attention the Government's concern with respect to conflicts of interest and to inform you of our policy as it relates to Parliamentary Secretaries.

Our policy's fundamental principle is that the integrity and objectivity of all persons having public responsibilities must be beyond question at all times. We thus have a personal duty scrupulously to avoid any financial transactions and remunerated activities which might result in our receipt of undue benefit or place us in a position of real or apparent conflict of interest.

The Government has formulated strict guidelines for application to Ministers and full-time Governor-in-Council appointees, who have wide-ranging roles of an administrative and executive nature.

Because of the wide variety of duties that may be given to individual Parliamentary Secretaries, the Government has decided not to establish a detailed and comprehensive formal conflict of interest régime for Parliamentary Secretaries as a group. It is all the more important, therefore, that you examine your own particular responsibilities as a Parliamentary Secretary on a continuous basis and ensure that there is no possibility that a real or apparent conflict of interest or any undue benefit will arise. I would encourage you to discuss any matters on which you may require some guidance with your Minister in order that misunderstandings may be avoided.

Parliamentary Secretaries are asked to observe certain guidelines relating to their activities after they have left Government service or which are in contemplation of leaving such service. They are aimed at avoiding any suspicion that former Parliamentary Secretaries

might use their past positions in a way that might adversely affect the objectivity and disinterestedness of Government service. I would ask you to act in accordance with these guidelines when you cease to serve as a Parliamentary Secretary.

Finally, I draw to your attention the provisions of the Senate and House of Commons Act, relating to conflict of interest, namely those dealing with incompatible offices, prohibited contracts with the Government and prohibitions on fees received for influencing other Parliamentarians. I would also urge you to read carefully Bill C-6, the Independence of Parliament Act, proposing a comprehensive conflict of interest régime for all Members of Parliament and Senators which received second reading in 1979 but was not passed by Parliament, as well as the second reading debates on this Bill. These latter documents should serve as useful background in your assessment of your personal position.

D. POST-EMPLOYMENT GUIDELINES FOR PARLIAMENTARY SECRETARIES

A. Offers of Employment Outside Government

1) Parliamentary Secretaries should not allow themselves to be influenced in their pursuit of their official duties by plans for or offers of employment outside Government:

- a) Parliamentary Secretaries should disclose to the Minister all serious offers of positions outside Government service which in their judgement put them in a position of a real or apparent conflict of interest;
- b) Parliamentary Secretaries should not accept any offers of employment outside Government service without first informing the Minister;
- c) Parliamentary Secretaries should, in seeking employment or an occupation outside Government service or in preparing themselves for commercial activities after they will have left Government service, ensure that these endeavours do not lead to real or apparent conflicts of interest or in any way interfere with their official duties.

2) In any official dealing with former office holders, Parliamentary Secretaries must ensure that they do not provide grounds or the appearance of grounds for allegations of improper influence, privileged access or preferential treatment.

B. Guidelines Applying to Employment and Commercial Activities of Former Parliamentary Secretaries

The following guidelines are to be applied with the aim of protecting the individual liberty of former Parliamentary Secretaries to the fullest extent possible.

These guidelines do not apply to former Parliamentary Secretaries who remain in the House of Commons to the extent that they would impede the performance of their duties as Parliamentarians, but in such circumstances the former Parliamentary Secretary must take care to follow the appropriate Parliamentary laws, rules and conventions relating to conflict of interest.

1) Within a period of one year of leaving office, Parliamentary Secretaries should not:

- a) accept appointment to a board of directors of a commercial corporation which, as a matter of course, was in a special relationship with the department with which they were associated on an ongoing basis during the last year of their tenure as Parliamentary Secretaries;
- b) change sides to act for or on behalf of any person or commercial corporation in connection with any specific proceeding, transaction, case or other matter to which the Government of Canada is a party and in which they had a personal and substantial involvement on behalf of the Government during the last year of their tenure as Parliamentary Secretaries;
- c) lobby for or on behalf of any person or commercial corporation before any department or agency with which agency they were associated on an ongoing basis during the last year of their tenure as Parliamentary Secretaries.

2) Within a period of six months of leaving office, Parliamentary Secretaries should not:

- a) accept employment with a commercial corporation with which they had significant

direct official dealings as Parliamentary Secretaries during the last year of their tenure;

- b) change sides to act for or on behalf of any person or commercial corporation in connection with any specific proceeding, case, transaction or other matter which fell under their authority during the last year of their tenure;
- c) give counsel for commercial purposes concerning the programs or policies of the department or agency with which they were associated on an ongoing basis, or with which they had a direct and substantial relationship during the last year of their tenure.

NOTES: For these purposes "department or agency" includes Crown corporations but not quasi-judicial bodies. "Special relationship" in respect of paragraph 1(a) means regulation of the corporation by the department or agency, receipt by the corporation of subsidies, loans or other capital assistance from the department or agency, and contractual relationships between the corporation and the department or agency.

E. GUIDELINES FOR GOVERNOR-IN-COUNCIL APPOINTEES

The text of the current Conflict of Interest Guidelines for Persons Appointed to Public Office by the Governor-in-Council provides as follows:

1. PURPOSE

The purpose of this memorandum and its Annexes is to provide details of the Government's guidelines on conflicts of interest for certain persons appointed to public office by the Governor-in-Council, and to provide information concerning the procedures to be followed by these persons in making arrangements to comply with the guidelines.

2. SCOPE OF APPLICATION

The guidelines set out in this memorandum apply to Governor-in-Council appointees (hereafter referred to as officials) who serve in such offices as may from time to time be designated by the Cabinet.

3. GUIDELINES

Officials are expected to arrange their private affairs in a manner that will prevent real or potential conflicts of interest from arising. A basic principle in the Government's conflict of interest policy is that the onus for preventing real or potential conflicts of interest is clearly on the individual.

As a minimum standard of conduct for officials, the guidelines for public servants set out in PC 1973-4065 of December 18th, 1973, (see Annex A) apply mutatis mutandis to all officials but guidelines in this memorandum take precedence over them. Specific provisions in any relevant legislation continue of course to apply.

A. Prohibited Practices

- (1) An official may not engage in the practice of a profession or in the management or operation of a business or commercial activity at any time while holding office;
- (2) Officials may not retain or accept directorships in any commercial corporations. Although it might be proper to retain or accept directorships in organizations of a philanthropic or non-commercial character, even here great care must be taken to prevent conflicts of interest from arising.

B. Arrangements with Respect to Property

- (1) Exempt property

Property held by an official for personal use and not of a commercial character is not subject to the requirements of divestment or public disclosure under these guidelines. Exempt property is subject however, as mentioned above, to the guidelines for public servants.

Examples of exempted property are: the residence or residences actually used by an official, including a summer or winter residence or farm actually used as a residence; personal household goods or effects or other property used for ordinary living and enjoyment; automobiles, boats, skidoos and other modes of transport for personal or family use including privately owned aircraft; cash, including cash held in chequing or savings accounts, Canada savings bonds, securities of any level of government in Canada or agencies of these

governments; registered retirement savings plans, and investments made in mutual funds for the purpose of providing retirement income; and debts.

If debts pose any conflict of interest problems, officials have a responsibility under these guidelines to seek advice either from their Minister or their Deputy Head.

(2) Non-exempt property

Officials, in arranging their private affairs with respect to non-exempt property, must either proceed by divestment and/or, where applicable, as set forth in paragraph (b) below, by public declaration.

(a) Divestment

Under this method, officials should divest themselves by selling or placing in trust their holdings of a business, commercial or financial nature, and particularly holdings in commercial enterprises or ventures that could be directly affected as to value by decisions taken by the Government pursuant or related to existing or proposed policy.

Officials who decide to place their holdings in trust may establish either a frozen trust or a blind trust. Care must be exercised to ensure that the terms of the trust agreement cannot be interpreted as leaving in the hands of the official any powers of management or decision over the assets placed in trust.

(1) Frozen Trust

A frozen trust is one in which the trustee is instructed to maintain the holdings placed in trust exactly as they were when the trust was established. An official who establishes a frozen trust will be empowered to receive from the trustee any income earned by the trust, and any information the filing of which is required by law. The Assistant Deputy Registrar General may act as trustee if an official wishes to enter into a frozen trust agreement between himself and the ADRG.

(ii) Blind Trust

A blind trust is one in which the trustee is empowered to make all investment decisions concerning the management of the trust, with no direction from or control by the official. In this type of trust, to ensure freedom from conflict, no information will be provided to the official except information required to permit an annual evaluation of the trust and any information the filing of which is required by law. An official who establishes a blind trust will be empowered to receive any income earned by the trust, and to add or withdraw capital funds as he sees it. (The ADRG cannot serve as trustee in any blind trust arrangement).

(iii) Duration of Trusts

The term of any trust is to be for as long as the official who establishes the trust continues to hold any office which the Cabinet has designated as subject to these guidelines.

(iv) Trustees

Care must be exercised in selecting trustees for either trust arrangement. If a single trustee is appointed, the trustee ought to be a public trustee or a company such as a bank, trust company, or investment company, which is public and known to be qualified in performing the duties of a trustee, or an individual who is recognized as performing trustee duties in the normal course of his work. If a single trustee is appointed he should clearly be "at arm's length" from the official. If more than one trustee is selected, at least one of them must be a public trustee or one of the institutions described above.

(v) Filing of Trust Documents

Under the two trust options available, officials will be required to file with the Assistant Deputy Registrar General two copies of any trust instrument and a statement that a trust has been executed. With the exception of the statement that a trust instrument exists, this information, including the copies of the trust instruments, will be kept in confidential files in the Office of the Assistant Deputy Registrar General and will not be made available to anyone for any purpose once it has been agreed that the trust instrument is in a form and of sufficient detail to comply with these guidelines or any guidelines issued supplementary to them with which the official is expected to comply.

(b) Public Declaration

Officials have the option of making a public declaration of certain kinds of holdings to provide added flexibility in dealing with property over which they may wish to retain control. Declaring ownership under this option will permit officials to deal with the property they declare in the same way as any other citizen subject only to the exercise of a greater degree of vigilance to ensure that ownership of the property that is declared publicly or dealings in this property cannot even remotely give rise to the appearance of a conflict of interest. Public declarations made by officials who choose to use this option must be registered, and will be open for inspection in a Public Registry to be set up for this purpose in the Office of the Assistant Deputy Registrar General.

There are limitations to the use of this option. It is intended primarily to be used in respect of property, such as leasehold interests, real property, private companies the stocks or shares of which are not traded on public exchanges, and other assets which cannot easily be affected as to value by decisions of Government policy. The use of

this option is not to extend to stocks or securities traded on public exchanges (which must either be sold or placed in trust), and must not extend to property the management of which could conceivably put an official in a conflict of interest situation.

C. Spouses and Dependent Children

These guidelines do not formally apply to spouses or dependent children. It is all the more important therefore that officials should bear in mind their individual responsibility to prevent conflicts of interest, including those that might conceivably arise out of dealings in property or other holdings, which are owned or managed, in whole or in part, by their spouse or dependent children.

4. ADMINISTRATIVE ARRANGEMENTS

(A) Completion

Arrangements made by an official to avoid conflicts of interest will be considered as complete when they have been approved by the ADRG and the Minister responsible for the official has been informed accordingly; when difficulties have arisen between the ADRG and the official, the Minister responsible shall approve the arrangement. In the case of Deputy Heads, the Prime Minister will approve the arrangements in instances of disputes.

(B) Costs

When the ADRG is chosen as the trustee for a frozen trust, any administrative costs incurred by the government in having him perform the duties of a trustee will be borne out of the public treasury. In all other cases, the responsibility for costs rests with the official.

(C) Public Registry

Officials will be required to register with the ADRG's Office any public declaration they may make of their interests or holdings.

In addition, they will be required to complete and provide to the ADRG's Office a general conflict of interest statement, on which they will indicate the arrangements they have made to comply with the Government's policy and these guidelines or guidelines supplementary to them.

These public declarations and general conflict of interest statements will be open to public inspection in the Public Registry. (A draft copy of the general conflict of interest statement, and a sample public declaration are attached for information purposes only.)

(D) Documents

(1) Safekeeping

The ADRG will be responsible for ensuring that any and all personal and confidential documents provided to his Office by officials to meet the requirements of these guidelines are placed in personal confidential files and held in secure safekeeping at all times. The ADRG will be responsible also for ensuring that documents provided to his Office by officials for purposes of official registration and public inspection are placed in personal unclassified files and held in safekeeping in the Public Registry where they will be open to public inspection.

(2) Return

If an official dies in office, his confidential file held in the ADRG's Office is to be closed and returned immediately to the executors of the official's estate by the ADRG so that no permanent record of his holdings or trust agreement will be maintained in the ADRG's Office. If an official relinquishes, or for any other reason ceases to hold any office to which he was appointed by the Governor-in-Council, and consequently ceases to be subject to the Government's policy on conflict of interest or to any guidelines issued pursuant to that policy, the ADRG, immediately he has been properly notified, will seal the official's confidential file and return it to the official. The ADRG will immediately withdraw the official's unclassified file from the Public Registry.

5. PROCEDURES

The procedures to be followed in implementing these guidelines are set out in an Annex B to this memorandum.

6. FAILURE TO COMPLY

An official failing to comply with the guidelines may be in breach of the public trust and is liable to sanctions up to and including revocation of appointment.

Annex A, P.C. 1973-4065, Public Servants Conflict of Interest Guidelines, is reproduced in Section I of this Schedule D. Annex B follows.

ANNEX B

PROCEDURES

The procedures to be followed to ensure that officials are able to arrange their personal affairs in a manner that will prevent real or potential conflicts of interest are listed below:

1. Each official will provide to the Assistant Deputy Registrar General (ADRG) information about all his personal investments and other holdings, including those that may be regarded as exempt property.
2. The ADRG or a member of his staff will examine the information provided by the official and will inform him whether in the opinion of the ADRG any or all of the official's investments or other holdings are exempt property, or alternatively, whether any or all of them are of a kind likely to give rise to a real or potential conflict of interest.
3. If it is the ADRG's opinion, after careful examination of the information provided by the official, that all the official's investments and other holdings are exempt property, the official will be so informed in writing by the ADRG who will at the same time ask the official to complete a general conflict of interest statement and return it to him. The ADRG will then inform the responsible Minister that he is satisfied in the light of the information disclosed by the official that the latter need not take further action to comply with the conflict of interest guidelines for officials.
4. If it is the ADRG's opinion that continued ownership or management by the official of any or all of his investments or other holdings is likely to give rise to a real or potential conflict of interest, he will so inform the official in writing and indicate that he will be available to give him advice on the guidelines.

5. The official will inform the ADRG in writing of the arrangements he proposes to make and will provide him with copies of all documents related to these arrangements, including two copies of any trust agreement, any public declaration and a completed general conflict of interest statement. The ADRG will examine the proposed arrangements and related documents and if he is of the opinion that the arrangements made and documents provided by the official meet the requirements of the conflict of interest guidelines for officials, he will so inform in writing the official and his Minister.

6. The firm expectation is that officials and the ADRG should and will have little or no difficulty in reaching agreement on the arrangements an official may wish to make to comply with the requirements of the conflict of interest guidelines. In view of this firm expectation it is incumbent on the ADRG and his staff (and equally on officials) to ensure that if any problem should arise, every possible solution is thoroughly and comprehensively explored in an effort to resolve the problem without having to refer it to higher authority. There may be, however, instances in which the ADRG may not agree with the arrangements proposed by an official, or in which an official for sound personal reasons, may feel that he can make arrangements that are consistent with the guidelines only by imposing undue cost or disadvantage on himself or his family. In these circumstances, the official should first seek the advice of his Deputy Head who may decide to refer the matter to his Minister. The latter's decision is final. If the issue involves a Deputy Head, he should seek the advice of the Clerk of the Privy Council who may consider the issue to be of sufficient significance to refer it to the Prime Minister for a final decision.

The firm expectation, however, is that references will be done only very rarely either to a Minister or to the Prime Minister.

7. The ADRG is to be informed of the resolution of the problems referred to in paragraph 6 and of the arrangements that will be made by the official who encountered the problem.

8. To ensure that all Public Declarations and general conflict of interest statements are accurate and up to date at all times, officials are asked to report to the ADRG any dealings in, additions to, deletions from, or other changes affecting property or holdings that were or will be dealt with through Public Declarations.

9. Exempted property need not of course be dealt with according to any of the options available under these guidelines, but officials are asked to inform the ADRG of any actions that might have the effect of removing property or other holdings from the exempted category.

10. Enquiries

Enquiries about these guidelines and conflict of interest matters generally, should be directed to:

Office of the Assistant Deputy Registrar General,
Department of Consumer and Corporate Affairs,
4th Floor, Trafalgar Building,
207 Queen Street,
Ottawa, Ontario K1A 0C9

The telephone number is (613) 995-0721.



CONFLICT OF INTEREST STATEMENT
DÉCLARATION CONCERNANT LES CONFLITS D'INTÉRÊTS

I, the undersigned, do hereby state that I am in compliance with the Government of Canada's guidelines on conflict of interest to which I am subject.

Je, soussigné(e), affirme par les présentes que je suis en conformité avec les lignes de conduite relatives aux conflits d'intérêts du Gouvernement du Canada auxquelles je suis assujetti(e).

I do hereby declare:

Je déclare par les présentes que:

☐ all my personal holdings are exempt property.
tous mes biens personnels sont des biens exclus.

☐ I have dealt with all my non-exempt property through the arrangements described below:
pour tous mes biens non-exclus, j'ai procédé par l'une et/ou l'autre des dispositions décrites ci-dessous:

a frozen trust: by instrument dated
une fiducie en compte bloqué: instrument en date du _____

a blind trust: by instrument dated
une fiducie sans droit de regard: instrument en date du _____

a Public Declaration dated
une Déclaration publique en date du _____

I make this statement for the purpose of official registration in the full knowledge that it will be available for public examination in the Conflict of Interest Public Registry.

Je fais la présente déclaration en sachant parfaitement qu'elle sera consignée officiellement dans le Registre public concernant les conflits d'intérêts auquel le public aura accès.

Date of Statement <i>Date de la déclaration</i>	Name of Declarer <i>Déclarant(e)</i>	Signature

**FOR THE USE OF THE
DEPUTY REGISTRAR GENERAL**

I hereby certify that this statement was filed with the Assistant Deputy Registrar General.

**À L'USAGE DU
SOUS-REGISTRAIRE GÉNÉRAL**

Je certifie par les présentes que cette déclaration a été déposée chez le sous-registraire général adjoint.

Date filed
Date déposée

Deputy Registrar General of Canada
Sous-registraire général du Canada

C O N F L I C T O F I N T E R E S T

PUBLIC DECLARATION

I,.....do hereby declare
that I hold a.....per cent (...) interest in the
firm known as.....
of.....

This declaration is made in accordance with the Conflict of
Interest Guidelines. I understand that so long as I remain
a.....subject to the guidelines
applicable to.....
this Declaration will be available for public examination in the
Office of the Assistant Deputy Registrar General.

Dated at Ottawa this.....day of....., 19..

(Signature)

F. POST-EMPLOYMENT GUIDELINES FOR OTHER PUBLIC OFFICE HOLDERS

The post-employment policy for public servants generally is set out in guidelines which are in fact made up of the following five separate appendices dated April 24, 1978, embodying the principles, rules and procedures.

Appendix I: Principles Regarding the Activities of Holders of Public Office

1) Current and former holders of public office must ensure by their actions that the objectivity and impartiality of government service are not cast in doubt and that the people of Canada are given no cause to believe that preferential treatment is being or will be unduly accorded to any person or organization.

2) Current and former holders of public office must ensure by their actions that there is no reasonable ground for belief that it is possible to have privileged access to government personnel or services.

3) Current and former holders of public office must exercise care in the management of their private affairs so as not to benefit, or to appear to benefit, from the use or communication of confidential information acquired in the course of their official duties.

Appendix II: Guidelines for Holders of Public Office During Their Employment with the Government

1) No Minister, Parliamentary Secretary, Governor-in-Council appointee, public servant or exempt staff member ("office holder") should allow himself to be influenced in his pursuit of official duties by plans for or offers of outside employment:

- a) the office holder should disclose to his superior all serious offers of positions outside government service which in his judgement put him in a position of a real or apparent conflict of interest;
- b) the office holder should disclose to his superior any job offer under serious consideration that has been received from an individual, organization or interest group with a commercial orientation in the private sector and with which the office holder has official dealings;
- c) the office holder should within a reasonable time disclose all offers of employment outside government service that have been accepted;

- d) the office holder should, in seeking employment outside government service or in preparing himself for commercial activities after he has left the employ of the government, take great care to ensure that these endeavours do not lead to real or apparent conflicts of interest or in any way interfere with his official duties, and do not in the absence of the permission of his superior involve commercial negotiations with other government employees.

2) Office holders have a duty in any official dealings they have with former office holders to ensure that they do not provide grounds or the appearance of grounds for allegations of improper influence, privileged access or preferential treatment.

NOTE: "Governor-in-Council appointees" denotes persons appointed by or with the approval of the Governor-in-Council or a Minister, or in receipt of remuneration fixed by the Governor-in-Council who are in full-time positions with government departments, Crown corporations and autonomous agencies, but not those persons who are members of bodies with primarily judicial or quasi-judicial functions.

Appendix III: Guidelines Applying to Employment and Commercial Activities of Former Holders of Public Office

The following guidelines are provided to give content to the principles in Appendix I, and are to be applied in accordance with those principles and with the aim of protecting the individual liberty of each public servant and former public servant to the fullest extent possible.

The guidelines apply to arrangements made before and after office holders leave government service. Former Ministers, deputy ministers, heads of agencies and exempt staff at the equivalent level of deputy head are requested not to engage in the activities described in category A for a period of two years, and to delay for one year any participation in activities described in category B. The corresponding delay period for parliamentary secretaries, other full-time Governor-in-Council appointees and public servants and exempt staff at the SX1 equivalent level or above is one year for category A and six months for category B. The guidelines do not apply to persons hired under Interchange Canada. The policy gives individual Ministers the right to designate other public servants, Governor-in-Council appointees and exempt staff, including those whose principal, though not exclusive, employment is with the government or one of its agencies, as being subject to the guidelines. The advisory committees may, upon request from a Minister or deputy minister and with the approval of the Prime Minister (in the case of deputy heads) of

the minister responsible (in the case of other full-time Governor-in-Council appointees and of exempt staff) and of Treasury Board (in the case of public servants) exempt any position or set of positions from the application of the guidelines in any case where the committees believe that such an exemption is in the public interest.

Category A

1. An office holder must not, within the relevant time period, accept appointment to a board of directors of a commercial corporation which was, as a matter of course, in a special relationship with the department or agency with which he was last employed, where "special relationship", means regulation of the corporation by the department or agency, receipt by the corporation of subsidies, loans or other capital assistance from the department or agency, and contractual relationships between the corporation and the department or agency.
2. An office holder must not, within the relevant time period, change sides to act for or on behalf of any person or commercial corporation in connection with any specific proceeding, transaction, case or other matter to which the Government of Canada is a party and in which he had a personal and substantial involvement on behalf of a department or agency of the government.
3. A former office holder, must not, within the relevant time period, lobby for or on behalf of any person or commercial corporation before any department or agency with which he was employed or with which he had a direct and substantial official relationship during the period of two years prior to the termination of his employment.

Category B

1. An office holder must not, within the relevant time period, accept employment with a commercial corporation with which he had significant direct official dealings during the last year of his employment.
2. An office holder must not, during the relevant time period, change sides to act for or on behalf of any person or commercial corporation in connection with any specific proceeding, cause, transaction or other matter which fell under his authority as an employee of the government during the period of one year prior to the termination of his employment.

3. A former office holder must not, within the relevant time period, give counsel for commercial purposes concerning the programs or policies of the department or agency with which he was employed or with which he had a direct and substantial relationship during the period of one year prior to the termination of his employment.

Where, pursuant to disclosure of an offer of employment under guidelines 1(a) or 1(b) of Appendix II, the advice of an advisory committee is sought with respect to the application of guidelines A1 and B1 the committee may advise that the time period for the purposes of these guidelines begins on the date the disclosure was made or on any date subsequent to the date of disclosure, that is before the date on which the office holder leaves government service.

Note: "Office holder" includes former "office holders", as defined by Appendix II, and "Governor-in-Council appointee" has the same meaning as in Appendix II.

Appendix IV: Administrative Arrangements

Advisory committees have been established to determine the application of the guidelines in specific instances and to help Ministers, Parliamentary Secretaries, appointees, public servants and exempt staff understand how the guidelines apply to their particular cases. The committees also advise on the operation of the guidelines and recommend changes where necessary. The committees are authorized to recommend exemptions from the guidelines in any case where fairness to individuals or the public interest requires. Such recommendations will be made to the Prime Minister (in the case of Ministers, Parliamentary Secretaries, and deputy heads) to the Minister responsible (in the case of other full-time Governor-in-Council appointees and of exempt staff) and to the Treasury Board (in the case of public servants).

An Advisory Committee chaired by the President of the Treasury Board and composed of selected Ministers has been established to advise all Ministers and Parliamentary Secretaries who require assistance in interpreting the application of the guidelines to specific circumstances.

An Advisory Committee made of the Clerk of the Privy Council and the Secretary to the Cabinet, the Secretary for Federal-Provincial Relations, the Secretary to the Treasury Board, the Chairman of the Public Service Commission and the Deputy Minister of Justice has also been established to advise all appointees of the Governor-in-Council and exempt staff who require assistance in interpreting the application of the guidelines to

specific circumstances. The Committee will report its advice to the Prime Minister and to the individual involved. The Prime Minister will in turn report to the House any known failure of former Governor-in-Council appointees or exempt staff to abide by advice given by the Committee.

Appropriate arrangements have been made similarly to advise public servants appointed under the Public Service Employment Act. In addition, all Crown corporations and autonomous agencies are urged to adopt similar guidelines and mechanisms for those of their senior employees who are neither public servants nor appointees of the Governor-in-Council. A special request has been made to ensure that members of the Armed Forces and the Royal Canadian Mounted Police will also be covered.

The policy will apply to all persons appointed to new positions within the government and its agencies, who will be expected to conform to it as a matter of honour and of personal choice. Before being sworn in, individuals will be asked to read the guidelines and to govern themselves accordingly. While the policy does not officially apply to present incumbents until such time as they accept new appointments in the public service, it is expected that they will continue to abide by it.

Appendix V: Rules of Practice of Hiring of Former Public Servants by the Government

1) In order to reduce the possibility of conflict of interest, a former Governor-in-Council appointee or public servant who has entered into the practice of lobbying on behalf of clients or of giving counsel for commercial purposes about government activities, will not, while so engaged, be considered to be eligible for appointment to the Board of Directors of a Crown corporation or of any agency in which the government of Canada has a majority interest.

2) Individual Ministers and the Treasury Board, as may be appropriate, will approve all personal service contracts involving payments by the government of \$2,000 or more to former Governor-in-Council appointees or public servants who are in receipt of a government pension and in so doing will consider carefully the total annual benefits to accrue to the individual as a result of his pension entitlement and of personal service contracts with the Government or its agencies.

G. CONFLICT OF INTEREST WORDING IN CONTRACTS OF EMPLOYMENT

The typical wording found in the contract of employment for a member of the public service contains the following condition:

I would like to bring to your attention that employees of the public service of Canada are required to observe the "Public Service Conflict of Interest Guidelines". Under Section 6 of these guidelines, employees are expected to disclose to their superiors any business, commercial or financial interest which might conceivably be construed as being in actual or potential conflict with their duties. A copy of these guidelines is attached and should be read. ... Please confirm your acceptance of this offer by signing and returning the duplicate copy of this letter ...

Some letters, which form the basis of the employment contract, simply state: "Also, I would like to remind you that employees of the public service of Canada are required to observe the 'Public Service Conflict of Interest Guidelines.'"

The typical wording found in many collective agreements regarding conflict of interest is as follows: "Unless otherwise specified by the Employer as being in an area that could represent a conflict of interest, employees shall not be restricted in engaging in other employment outside the hours they are required to work for the Employer."

H. OATHS OR AFFIRMATIONS

Following are the Oath or Affirmation of Allegiance, the Oath or Affirmation of Office and Secrecy and the Oath or Affirmation required of members of the Privy Council.

OATH OR AFFIRMATION OF ALLEGIANCE

You, _____ do swear (or affirm) that you will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Her Heirs and Successors according to law.

SO HELP YOU GOD.
(omit for affirmation)

OATH OR AFFIRMATION OF OFFICE AND SECRECY

I, _____ solemnly and sincerely swear (or affirm) that I will faithfully and honestly fulfil the duties that devolve upon me by reason of my employment in the Public Service and that I will not, without due authority in that behalf, disclose or make known any matter than comes to my knowledge by reason of such employment. (in the case where an oath is taken add, "So help me God").

OATH OR AFFIRMATION OF THE MEMBERS OF THE PRIVY COUNCIL

You, do solemnly promise and swear (or affirm) that you will serve Her Majesty truly and faithfully in the Place of Her Council in this Her Majesty's Dominion of Canada, you will keep close and secret all such matters as shall be treated, debated and resolved on in Privy Council, without publishing or disclosing the same or any part thereof, by word, writing, or any otherwise to any person out of the same Council, but to such only as be of the Council, and yet if any matter so propounded, treated and debated in any such Privy Council, shall touch any particular person, sworn (or affirmed) of the same Council upon any such matter as shall in any wise concern his loyalty and fidelity to the Queen's Majesty, you will in no wise open the same to him, but keep it secret, as you would from any person, until the Queen's Majesty's pleasure be known in that behalf. You will in all things to be moved, treated and debated in any such Privy Council, faithfully, honestly and truly declare your mind and opinion to the honour and benefit of the Queen's Majesty, and the good of her subjects without partiality or exception of person, in no wise forbearing so to do from any manner of respect, favour, love, meed, displeasure, or dread of any person or persons whatsoever. In general you will be vigilant, diligent and circumspect in all your doings touching the Queen's Majesty's affairs; all which matters and things you will faithfully observe and keep, as a good Councillor ought to do to the utmost of your power, will and discretion.

SO HELP YOU GOD.
(omit for affirmation)

I. CONFLICT OF INTEREST GUIDELINES FOR PUBLIC SERVANTS

P.C. 1973-4065

GUIDELINES TO BE OBSERVED BY PUBLIC SERVANTS CONCERNING
CONFLICT OF INTEREST SITUATIONS

Short Title

1. These Guidelines may be cited as the Public Servants Conflict of Interest Guidelines.

Guidelines

2. It is by no means sufficient for a person in a position of responsibility in the public service to act within the law. There is an obligation not simply to obey the law but to act in a manner so scrupulous that it will bear the closest public scrutiny. In order that honesty and impartiality may

be beyond doubt, public servants should not place themselves in a position where they are under obligation to any person who might benefit from special consideration or favour on their part or seek in any way to gain special treatment from them. Equally, public servants should not have a pecuniary interest that could conflict in any manner with the discharge of their official duties.

3. No conflict should exist or appear to exist between the private interests of public servants and their official duties. Upon appointment to office, public servants are expected to arrange their private affairs in a manner that will prevent conflicts of interest from arising.
4. Public servants should exercise care in the management of their private affairs so as not to benefit, or appear to benefit, from the use of information acquired during the course of their official duties, which information is not generally available to the public.
5. Public servants should not place themselves in a position where they could derive any direct or indirect benefit or interest from any government contracts over which they can influence decisions.
6. All public servants are expected to disclose to their superiors, in a manner to be notified, all business, commercial or financial interests where such interests might conceivably be construed as being in actual or potential conflict with their official duties.
7. Public servants should hold no outside office or employment that could place on them demands inconsistent with their official duties or call into question their capacity to perform those duties in an objective manner.
8. Public servants should not accord, in the performance of their official duties, preferential treatment to relatives or friends or to organizations in which they or their relatives or friends have an interest, financial or otherwise.

SCHEDULE E

TENTATIVE DRAFT

THE HOUSE OF COMMONS OF CANADA

BILL C-000

An Act to require public office holders to act in accordance with certain principles of conduct, and to provide for the creation of an Office of Public Sector Ethics and the appointment of an Ethics Counsellor as head of that Office, and related purposes.

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Short Title

1. This Act may be cited as the Ethics in Government Act.

OBJECTS

2. The objects of this Act are:
 - (a) to enhance public confidence in the integrity of public office holders;
 - (b) to establish a code of clear rules of ethical conduct applicable to all public office holders in the Government of Canada (including any department, commission, Crown corporation, council, board, bureau, agency, tribunal, or other establishment or political subdivision thereof) or any other public office holder appointed by the Governor-in-Council or by a minister;
 - (c) to minimize conflicts between the private and public interests of public office holders;
 - (d) to do the foregoing in a manner which preserves the independence of judges

and quasi-judicial agencies from government interference; and

- (e) to encourage experienced and competent citizens to seek and accept public office and to facilitate interchange between private and public life.

INTERPRETATION

3. In this Act

"Non-elected public office holder" means all public office holders except ministers, parliamentary secretaries, and ministers' exempt staff.

"Public office holder" means officers and employees of Her Majesty in right of Canada, and for greater certainty, includes ministers, parliamentary secretaries; Governor-in-Council appointees; public servants; exempt staff members; officers, directors, or employees of federal boards, commissions, tribunals, Crown corporations and other agencies; officers and employees of the Parliament of Canada; members of the Canadian Armed Forces; and members of the Royal Canadian Mounted Police.

"Quasi-judicial agency" means any tribunal, board, commission or agency of the Government of Canada whose functions involve deliberative proceedings culminating in decisions made between contending interests.

CODE OF ETHICAL CONDUCT

Binding Effect
of Code

4. Every public office holder now in office or hereafter appointed shall conform to the following principles of conduct:

Preamble

Service to one's country is a noble calling. Individuals holding public office, whether with great or modest duties, carry with them a portion of the responsibility for the destiny of our country and a part of the public trust which all Canadians vest in government.

The public trust rests on a belief and confidence that those in public offices will conduct themselves in an ethical fashion.

In furtherance of these precepts, the following principles shall be binding upon each public office holder.

Principles

1. It is by no means sufficient for those persons holding public office in Canada to act within the law. There is a further obligation to act in a manner that will bear the closest public scrutiny.

2. Any conflict between the private interests of public office holders and their official duties must be resolved in favour of the public interest. Upon appointment to office, and thereafter, public office holders are expected to arrange their private affairs in a manner that will prevent such conflicts of interest from arising.

3. Public office holders shall neither solicit nor, other than for incidental gifts or customary hospitality of nominal value, accept transfers of economic value from private sources, even though no bribery is involved. This principle applies where the transfer is discretionary as distinct from being pursuant to an enforceable contract or property right of the public official.

4. Non-elected public office holders shall not, without prior approval of their superior, step out of their official roles to assist private entities or persons in their dealings with the government where this would result in preferential treatment.

5. Public office holders shall not knowingly take personal advantage of or private benefit from information obtained in the course of their official duties which is not generally available to the public.

6. Public office holders shall not directly or indirectly use, or allow the use of, government property of any kind, including

property leased to the government, for anything other than officially approved activities.

7. Non-elected public office holders shall not engage in partisan political activities which impair the political neutrality, either real or perceived, of the public service.

8. Non-elected public office holders shall not express publicly their personal views on matters of political controversy, or on government policy or administration (apart from collective bargaining issues), where this is likely to impair public confidence in the existing or subsequent performance of their duties or which is likely to impair relations with other governments.

9. Public office holders shall not engage in personal conduct which exploits for private reasons or personal gratification their position of authority, or which would tend to discredit the professionalism of the public service.

10. Public office holders have a duty not to act, after they leave office, in such a manner as to cast doubt on the probity and impartiality of the governmental process or in any other way to diminish public confidence in the integrity of government.

PROCEDURAL RULES TO

MINIMIZE CONFLICTS OF INTEREST

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| Regulations | 5. The Governor-in-Council may make regulations outlining procedures to be followed by public office holders in order for them to act in accordance with the general principles enunciated in the Code of Ethical Conduct, and in particular to minimize conflicts between their private interests and public duties. |
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OFFICE OF PUBLIC SECTOR ETHICS

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| Establishment of Office | 6. (a) There is hereby established an Office of Public Sector Ethics. |
| Appointment of Ethics Counsellor | (b) The Governor-in-Council may appoint an officer, to be called the Ethics Counsellor, who shall be the head of the Office of Public Sector Ethics. |
| Staff | (c) The Ethics Counsellor may determine the staff requirements for the Office of Public Sector Ethics as required. Such staff shall be appointed pursuant to the Public Service Employment Act. |

FUNCTIONS OF ETHICS COUNSELLOR

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| Advisory Role | 7. (a) The Ethics Counsellor shall act as adviser: |
| | (i) to the Prime Minister with respect to the procedures applicable to ministers, parliamentary secretaries, and public office holders appointed by Governor-in-Council; |
| | (ii) to ministers with respect to the procedures applicable to them, and to the exempt staff of ministers' offices; and |
| | (iii) to heads of departments and agencies with respect to the procedures applicable to them and their personnel. |

- (b) The Ethics Counsellor shall not be liable in law for any advice so provided.
- (c) In a case where the Ethics Counsellor is asked to investigate a matter pursuant to Section 10 of this Act, and it is a matter in respect of which advice already has been given pursuant to this section, the Ethics Counsellor shall designate another person outside the Office of Public Sector Ethics to conduct such investigation and make public a report thereon.

Administrative
Role

8. The Ethics Counsellor shall administer procedural rules established pursuant to section 5 of this Act to assist public office holders to act in accordance with the principles enunciated in the Code of Ethical Conduct including, but not limited to, the establishment or monitoring of trust arrangements, the required disclosures of private interests of public office holders, and the divestment of assets in cases where such is required.

Information
and Education

9. The Ethics Counsellor shall provide information to public office holders and other interested parties, including prospective public office holders whenever practicable, as to the Code of Ethical Conduct, the procedural rules established pursuant to section 5 of this Act, any supplemental codes of ethical conduct, practices developed to assist public office holders to minimize conflicts of interest, and related matters.

Investigative
Role

10. The Ethics Counsellor shall, at the request of the Prime Minister (with respect to any public office holder other than judges governed by the Judges Act), at the request of a minister (with respect to any public office holder for whom that minister is responsible and with the Prime Minister's consent), or at the request of any deputy minister or head of agency (with respect to any public office holder for whom the deputy minister or head of agency is responsible, and with the consent of the minister to whom such deputy minister or head of agency reports), conduct an investigation of any matter involving an alleged breach of the Code

of Ethical Conduct, or of the Procedural Rules made pursuant to section 5 of this Act. For the purpose of such an investigation, the Ethics Counsellor shall have access to any government files or information relevant to the investigation. The Ethics Counsellor shall provide an opportunity for all parties concerned with the investigation to be heard, and in the case of anyone alleged to have breached the Code or rules, such persons shall be entitled to be represented by counsel. The hearings shall be open or closed, as the Ethics Counsellor considers appropriate. A report by the Ethics Counsellor on the investigation shall be made to the person requesting the investigation, and shall be made public by the Ethics Counsellor within three working days thereafter.

SUPPLEMENTAL CODES OF CONDUCT

11. The Ethics Counsellor shall assist deputy ministers and heads of agencies or commissions in restating in common format the rules in existing supplemental codes of ethical conduct as developed for that particular department, commission or agency, so that the same terminology, procedures and interpretations apply throughout the government, and shall assist deputy ministers and heads of agencies and commissions to develop supplemental codes according to the same common format where such do not yet exist.

FURTHER POWERS AND DUTIES

Authority to
Waive or
Modify

12. (a) The Ethics Counsellor shall, upon written application by the public office holder affected, have authority to waive or modify the particular application of any rule or procedure established pursuant to section 5 of this Act in specific cases where an unfair or unreasonable result would otherwise be imposed on the public office holder, so long as the principles in the Code of Ethical Conduct are still observed in the specific case in question, and provided that such waiver or modification shall be in writing,

stating the reasons, be made public, and a copy placed in a Public Registry in the Office of Public Sector Ethics.

- (b) Where the public office holder seeking the waiver or modification would not, because of routine lines of reporting or accountability, have direct access to the Ethics Counsellor, such written request shall be accompanied by the consent of the Prime Minister, minister, deputy minister or head of the agency, as the case requires.

Report of the
Ethics Counsellor

- 13. (a) The Ethics Counsellor shall, on or before the 31st day of December next following the end of each fiscal year, prepare a report relating to the operations of his or her office for that fiscal year but shall not include therein any confidential information supplied to him or her or his or her office by a public office holder. The Prime Minister shall cause this report to be laid before Parliament on that date or, if Parliament is not then sitting, on any of the first fifteen days that either House of Parliament is sitting thereafter.

- (b) At the same time and for the same fiscal year the Prime Minister shall cause to be prepared and to be laid before Parliament a report of any action taken or any penalties imposed with respect to failure on the part of public office holders to observe the rules of conduct or to comply with procedures or any charges laid against public office holders under the Criminal Code or other statutes.

THE JUDICIARY ANDQUASI-JUDICIAL AGENCIES

- Independence 14. (a) In order to preserve judicial independence, the Governor-in-Council shall make no regulations under section 5 of this Act as to procedures to be followed by public office holders who are judges or who are appointed by Governor-in-Council as members of quasi-judicial agencies.
- (b) Rules to minimize conflicts of interest applicable to members of quasi-judicial agencies shall be as contained in the amendments provided for in section 20 of this Act, or in subsequent enactments with respect to quasi-judicial agencies established hereafter from time to time.

CROWN CORPORATIONS

- C.B.C.A.
provisions
apply 15. (a) The provisions of the Canada Business Corporations Act applicable to officers and directors with respect to conflicts of interest shall apply, mutatis mutandis, to all Crown corporations of the Government of Canada.
- (b) For greater certainty, the Code of Ethical Conduct enacted by this Act is binding upon all officers, directors and employees of Crown corporations of the Government of Canada, except that the limitations on political activity and public comment as contained in principles 7 and 8 shall not be binding upon part-time Governor-in-Council appointees on their boards of directors.
- (c) Each Crown corporation of the Government of Canada shall develop a Supplemental Code of Conduct, specifying rules and procedures to minimize conflicts of interest which are appropriate to the requirements and particular attributes of the Crown corporation in question.

- (d) The Supplemental Code shall in each case be developed by the Crown corporation in conjunction with the Ethics Counsellor, who shall ensure that common terminology and procedures are employed to the greatest extent possible in all Crown corporation supplemental codes, and that specified matters be addressed in each.
- (e) The Supplemental Codes shall thereupon be enacted as regulations pursuant to each Crown corporation's governing statute, either separately or in an omnibus bill.
- (f) In the case of Crown corporations created by Order-in-Council rather than statute, the applicable provisions on conflict of interest from the Canada Business Corporations Act shall be included in the Supplemental Code for that Crown corporation, and the Supplemental Code shall be enacted by order-in-council.
- (g) In the case of new Crown corporations established from time to time, the foregoing provisions shall apply.

PARTISAN ACTIVITY

- 16. (1) No deputy minister or head of agency, and, except as authorized under this section, no other non-elected public office holder, shall
 - (a) engage in work for, on behalf of or against a candidate for election as a member of the House of Commons, a member of the legislature of a province or a member of the Council of the Yukon Territory or the Northwest Territories, or engage in work for, on behalf of or against a political party, or
 - (b) be a candidate for election as a member described in paragraph (a).

- (2) A person does not contravene subsection (1) by reason only of attending a political meeting or contributing money for the funds of a candidate for election as a member described in paragraph (1) (a) or money for the funds of a political party.
- (3) Notwithstanding any other Act, upon application made to the Ethics Counsellor by a non-elected public office holder (other than a deputy minister or a head of agency), the Ethics Counsellor may, if he or she is of the opinion that the usefulness to the public service of that public office holder in the position he or she then occupies would not be impaired by reason of his or her having been a candidate for election as a member described in paragraph (1) (a), grant to the non-elected public office holder leave of absence without pay to seek nomination as a candidate and to be a candidate for election as such a member, for a period ending on the day on which the results of the election are officially declared or on such earlier day as may be requested by the employee if he has ceased to be a candidate.
- (4) Forthwith upon granting any leave of absence under subsection (3), the Ethics Counsellor shall cause notice of his or her action to be published in the Canada Gazette.
- (5) An individual on leave who is declared elected as a member described in paragraph (1)(a) thereupon ceases to be a non-elected public office holder.
- (6) (a) Where any allegation is made to the Ethics Counsellor by a person who is or has been a candidate for election as a member described in (1)(a), that a deputy minister or head of agency or other non-elected public office holder has contravened subsection (1), the allegation shall be referred to the Ethics Counsellor who shall conduct an inquiry at which the person making the allegation and the deputy minister or

head of an agency or other non-elected public office holder concerned, or their representatives, are given an opportunity of being heard.

- (b) In the case of a deputy minister or head of agency, the Ethics Counsellor shall report his or her decision on the inquiry to the Governor-in-Council who may, if the Ethics Counsellor has decided that the deputy minister or head of agency has contravened subsection (1), dismiss him or her.
- (c) In the case of any other non-elected public office holder, the Ethics Counsellor, if deciding that the individual concerned has contravened subsection (1), may recommend to the deputy minister or head of an agency that the individual be dismissed, and such action shall forthwith be taken by the deputy minister or head of agency.

17. Section 32 of the Public Service Employment Act is hereby repealed.

PUBLIC COMMENT

- 18. (a) Where a non-elected public office holder engages in partisan political activity of a type not covered by section 16 but which appears to violate principle 7 of the Code of Ethical Conduct, or expresses publicly his or her personal views on matters which appear to be in violation of principle 8 of the Code of Ethical Conduct, the matter may be referred by the minister, deputy minister or head of agency responsible for the non-elected public office holder in question to the Ethics Counsellor. The Ethics Counsellor shall thereupon conduct an inquiry at which the person in question or his or her representatives are given an opportunity to be heard, and who shall make a report with respect to the matter to the person who referred the case for inquiry.
- (b) The Ethics Counsellor, if deciding on the basis of the inquiry that the non-elected

public office holder has contravened the principle 7 or 8, or both, may recommend in the report on the matter that the individual be dismissed, and such action shall be forthwith taken by the minister, deputy minister or head of agency concerned.

MISCELLANEOUS

Sworn
Testimony

19. Nothing in the Code of Ethical Conduct or any rules made pursuant to this Act shall prevent a former public office holder from giving testimony under oath or affirmation, or from making statements required to be made under penalty of perjury.
20. The following acts are hereby amended:
 - (a) The Anti-dumping Act, with respect to the Anti-Dumping Tribunal, by insertion of the following section:

 - (b) The Atomic Energy Control Act, with respect to the Atomic Energy Control Board, by insertion of the following section:

 - (c) The Canadian Radio-television and Telecommunications Commission Act, with respect to the Canadian Radio-television and Telecommunications Commission, by insertion of the following section:

 - (d) The Canada Labour Relations Code, with respect to the Canada Labour Relations Board, by insertion of the following section:

 - (e) The Canada Lands Surveys Act, with respect to the Board of Examiners, by insertion of the following section:

 - (f) The National Energy Board Act, with respect to the National Energy Board, by insertion of the following section:

- (g) The National Transportation Act, with respect to the Canadian Transport Commission, by insertion of the following section:

- (h) The Public Service Staff Relations Act, with respect to the Public Service Staff Relations Board, by insertion of the following section:

- (i) The Employment and Immigration Department and Commission Act, with respect to the Canada Employment and Immigration Commission, by insertion of the following section:

- (j) The Energy Supplies Emergency Act, 1979, with respect to the Energy Supplies Allocation Board, by insertion of the following section:

- (k) The Anti-Inflation Act, with respect to the Administrator, by insertion of the following section:

- (l) The Combines Investigation Act, with respect to the Restrictive Trade Practices Commission, by insertion of the following section:

- (m) The Canadian Human Rights Act, with respect to the Canadian Human Rights Commission, by insertion of the following section:

- (n) The Tariff Board Act, with respect to the Tariff Board, by insertion of the following section:

